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SELECTION OF LEADING CASES.

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PART IX.

Law of Crimes and the General Principles OF Criminal Procedure.

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SELECTION OF LEADING CASES.

IX

Law of Crimes and the General Principles of Criminal Procedure.

QUEEN-EMPRESS

v.

BAL GANGADHAR TILAK AND KESHAV MAHADEV BAL.

1897.
September 8 to 11 and 13 and 14.

[*Reported in I. L. R., 22 Bom., 112.*]

The publications which gave rise to the trial were as follows :—

I.

SHIVAJI'S UTTERANCES.

By annihilating the wicked I lightened the great weight on the terraqueous globe. I delivered the country by establishing "Swarajya"(1) (and) by saving religion. I betook myself to heaven(2) to shake off the great exhaustion which had come upon me. I was asleep ; why then did you, my darlings, awaken me? I had planted upon this soil the virtues that may be likened to the Kalpavriksha(3), of sublime policy(4), based on a strong foundation, valour in the battlefield like that of Karna(5), patriotism, genuine dauntlessness, (and) unity the best of all. Perhaps you now wish to show me the delicious fruits of these. Alack ! What is this ? I see a fort has crumbled down. Through (mis)fortune I get a broken stone to sit upon. Why does not my heart break like that this day ? Alas ! Alas ! I now see with (my own) eyes the ruin of (my) country. Those forts of mine, to build which I expended money like rain, to acquire which fresh (and) fiery blood was spilled there, from which I

---

(1) Literally "one's own government," native rule.

(2) The text of "heaven" literally means "the Paradise of Indra."

(3) One of the five trees of Indra's heaven which yields whatever may be desired.

(4) May also mean "morality."

(5) The name of the half-brother to the Pándav princes, famed for munificence.

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sallied forth roaring like a lion through the ravines, have crumbled down. What a desolation is this! Foreigners are dragging out Lakshmi(1) violently by the hand(2) by (means of) persecution. Along with her plenty has fled (and) after (that) health also. This wicked Akábáya(3) stalks with famine through the whole country. Relentless death moves about spreading epidemics of diseases.

Shlók (Metre.)

Say, ye, where are those splendid Mávlas, my second lives(4), who promptly shed their blood on the spot where my perspiration fell? They eat bread once(5) (in a day), but not enough of that even. They toil through hard times by tying up their stomachs (to appease the pangs of hunger). Oh people! how did you tolerate in the Kshetra(6) the incarceration of those good preceptors, those religious teachers of mine, the Bráhmans whom I protected, (and) who, while they abided by their own religion in times of peace, forsook the drabha(7) in (their) hands for arms which they bore when occasion required? The cow—the foster-mother of babes when (their) mother leaves (them) behind—the mainstay of the agriculturists, the imparter of strength to many people, which I worshipped as my mother, and protected more than (my) life, is taken daily to the slaughter-house and ruthlessly slaughtered (there). "He himself came running exactly within the line of fire of (my) gun!" "I thought (him to be) a bear!" "Their spleens are daily enlarged!" How do the white men escape by urging these meaningless pleas? This great injustice seems to prevail in these days in the tribunals of justice. Could any man have dared to cast(8) an improper glance at the wife of another, a thousand sharp swords (would have) leapt out of (their) scabbards instantly. Now, (however), opportunities are availed of in railway carriages, and women are dragged by the hand. You eunuchs! How do you brook this? Get that redressed! "He is mad. Lift him up and send him at once on a pilgrimage." "He is fond of pleasure. Deprive (him of his) powers, saying that it would be for a time only." This is the way in which royal families are

(1) The goddess of wealth.

(2) There being a pun upon the word "kara," which means both "the hand" and "taxes," the second meaning of this sentence may be got at by substituting "by (levying) taxes" for "by the hand."

(3) The eldest sister of Fortune; *Miss Fortune*; misfortune personified.

(4) "Second lives," *i.e.*, beloved.

(5) Meaning, they take only one meal a day.

(6) A sacred place.

(7) A sacred grass used in sacrifice, &c.

(8) The text of these words literally means "oblique vision."

being handled now. What misfortune has overtaken (the land)! How have all these kings become quite effeminate, like those on the chess-board! How can I bear to see this heart-rending sight? I turn (my) glance in another direction after telling (*i.e.*, leaving with you) a brief message. Give my compliments to my good friends, your rulers, over whose vast dominions the sun never sets. Tell them "How have you forgotten that old way of yours, when with scales in hand you used to sell (your goods) in (your) ware-houses." (As) my expeditions in that direction were frequent, it was at that time possible (for me) to drive you back to (your own) country. The Hindus, however, being magnanimous by nature, I protected you. Have you not thus been laid under deep obligations! Make, then, your subjects, who are my own children, happy. It will be good for (your) reputation if you show your gratitude now by discharging this debt (of obligation).

Mark of the Bhawani Sword.

II.

The Shri Shivaji-coronation festival here commenced on Saturday, the 12th instant, and was brought to a close last night. The temple of Vithal, near the Lakdipul (*i.e.*, wooden bridge), was decorated in an excellent style for the festival. An image of Shri Shivaji on horseback was installed and around (it) were arranged pictures of Shri Shivaji Máharája drawn by different artists. The picture drawn specially for this festival by Mr. Pimpalkhare, the accomplished local artist, representing the incident of Samarth Ramdas Swami and Shri Shivaji Máharája meeting in the jungle at the foot of Sajjangad and the Samarth exhorting Shri Shivaji; and the "bust" of the Máharája executed by Mr. Bhide, were worth seeing. (Some) students having recited *pada* (songs) in praise (of Shivaji) at the commencement of the festival, Professor Paranjpe read the *Purán*. He had for the text of his *Purán* (reading) the story in the Mahábhárat, about the exasperation on (his) return (home) of the ambitious Suyodhana at the sight of the *Rájasuya* sacrifice(1) performed by Dharmarája, his thoughts in that connection (and) the conversation he had with Shakunimáma and Dhritaráshtra (on the subject.) The *Purán* reader having, with a view to give (his) audience a clear idea of the *Rájasuya* sacrifice, compared it with the Diamond Jubilee, commenced the *Purán* (reading), observing, by way of an exordium, that his was

(1) A sacrifice performed by a universal monarch attended by his tributary princes.

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not an attempt to uphold (or justify) what Duryodhana did, but (only) to lay before them the (1) philosophical enquiry pursued in the Mahábhárat as to the potency and quality of ambition which inspires all beings, and the innate power it has of elevating a country or a party. Professor Paranjpe's style of speaking is vigorous and impressive, (and) therefore the excellence of the most beautiful picture which Shri Vyasa has depicted of an ambitious mind was on this occasion well impressed upon the minds of (his) hearers by the *Purán* reader. (2)"Discontent is the root of prosperity; but contentment destroys prosperity." These maxims were the sum and substance of the *Purán* (reading). The dissertation as to how a man, even in affluent circumstances, prefers death in his exasperation to the indignity of being trampled under foot by his enemies, and how a discontented man secures co-operation and makes up for the lack of arms (and) missiles by (his) craftiness and other matters, was specially impressive. After the *Purán* (reading) was over, Professor Jinsiwale very earnestly requested the audience to study the Mahábhárat. Professor Jinsiwale on this occasion said that the reason why Shri Shivaji Mahárája should be considered superior to Cæsar (and) Napoleon was that, while the great men of Europe were actuated by ambition alone, like Duryodhana, the uncommon attributes displayed by our Mahárája were not the blaze of the fire of ambition or discontent, but were the outcome of the terrible irritation at the ruin of his country and religion by foreigners. After the (reading of the) *Purán* there was a *Kirtan*(3) by the pious Matangi Báva at night. The vêrses composed by the Báva himself on the coronation (of Shivaji) were couched in simple language, and as the Báva had all the accompaniments required for the *Katha*(4) with him, the *Katha*(4) was very much enjoyed. (5)Veda-Shástra-Sampanna(5) (5) Matangi had specially come here from Sátára for this *Katha* (4).

On the morning of the second day there were athletic sports in Vinchurkar's Wáda. The students of the New English School and the Nutan Maráthi Vidyálaya and the other schools acquitted themselves creditably in their performance with Indian clubs and on the mulkhamb(6). The students of the New School showed themselves

(1) This may also be thus rendered :—"but (only) to lay before them, in an elementary form, the enquiry pursued in the Mahábhárat," &c.

(2) This text is in Sanskrit.

(3) Celebrating the praises of a god with music and singing.

(4) A legend of the exploits of some god related with music and singing.

(5) Learned in the Vedas and Shástras.

(6) A pillar on which athletes perform their feats.

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to be proficient in playing Káthi(1), dándpatta(2), botháti(3), &c. We hope that the students of other schools will follow their example (in this matter). The students attending the various schools as well as the people attending the gymnasia at this place will not find better occasion than the festival (of the anniversary) of Shivaji's birth for exhibiting their skill in manly sports. If the managers of the various schools take concerted action in this matter, it is likely to give special encouragement to physical and manly sports amongst boys. We hope that this our suggestion will be duly considered by the principals of different schools. Well, on the night of the same day a lecture on the subject of "The killing of Afzulkhan" was delivered by Professor Bhanu, under the presidentship of Mr. Tilak. The Professor ably refuted the charge of "murder" which English historians bring against Shri Shivaji Mahárája. The Professor has abundant (or strong) evidence in his possession (to prove) that Pantoji Gopinath was not a servant of Afzulkhan, but was from the first a servant of Shri Shivaji Mahárája(4). Professor Bhanu having no permission to publish the papers relating to this matter for two years (more), did not place his (documentary) evidence on this (subject) before the meeting(4). It is, therefore, evident that the charge of treachery brought against Pantoji Gopinath, is literally false. How was it possible for the Mahárája even to imagine that Afzulkhan, who had undertaken on oath either to seize (Shivaji) and bring him alive or to kill him and bring his head to Bijápur, and who had on (his) way trodden under foot the goddess of Tuljápur and the Vithoba of Pandharpur, meant really to treat with him? What treachery did the Mahárája commit if he went to meet Afzulkhan on the *machi*(5) of Pratápgad after making every preparation for battle for his (own) safety? The English historians assert that the Mahárája was the first to thrust in the *waghnakhs*(6), but we see it stated in two *bakhars* (*i. e.* memoirs), one of them written thirty years after the death of the Mahárája and the other about a hundred years after (his) death, that Afzulkhan was the first to strike (Shivaji). Even if we assume that the Mahárája was the first to

(1) A stick.

(2) Exercise with a fencing stick in one hand and the weapon called "patta" in the other.

(3) A staff of bamboo with a top-knot or bunch of cloth.

(4) These brackets are in the original.

(5) Level ground at the foot or between the foot and summit of a mountain.

(6) A weapen resembling a tiger's claw.

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strike Afzulkhan, what right has any writer to call that man a "murderer," who, while nine years of age, had divine inspiration not to bow down his head in the slightest degree before the Musalman Emperors? If Mazzini of Italy dons a mourning dress from (his) ninth year for the loss of the independence (of his country), why should not the Mahárája even at a tender age be stirred to put forth prodigious efforts for protecting(1) the walking and speaking depositories of knowledge(1) and the kine which are the living index of our prosperity? How can English writers have the audacity to belaud Clive and Warren Hastings, who were incomparably inferior to the Mahárája and whose careers were fraught with foul deeds? Is it not a deliberate outrage to the purity of truth that the pen of the same English writers, whose (code of) morality refrains from applying the epithet "rebel" in speaking of Washington, calls Shivaji a rebel? The History of Europe cannot show even a single upright man of Shivaji's type. History will find fault with Shivaji, (but) from the point of view of ethics his act does not merit censure. How can the European science of ethics, which has "the greatest good of the greatest number" as its basis (or principal axiom), condemn Shivaji for abandoning a minor duty for the purpose of accomplishing the major one? In the Mahábhárat a man of this type is called '*Buddha*'(2). The Professor concluded (his discourse on) the original theme with the declaration that even if (the Mahárája) had committed five or fifty more faults (? crimes), more terrible than those which historians allege Shivaji committed, he would have been just as ready as at that moment to profoundly prostrate himself a hundred times before the image of the Mahárája.

At the conclusion of the lecture Professor Bhanu said: Every Hindu, every Marátha, to whatever party he may belong, must rejoice at this (Shivaji) festival. We all are striving to regain (our) lost independence, and this terrible load is to be uplifted by us all in combination. It will never be proper to place obstacles in the way of any person who, with a true mind, follows the path of uplifting this burden in the manner he deems fit. Our mutual dissensions impede our progress greatly. If any one be crushing down the country from above, cut him off; but do not put impediments in the way of others. Let bygones be bygones; let us forget them and forgive one another for them. Have we not had enough of that strife, which would have the same value in the estimation of great

(1) *i.e.*, the Brahmans.

(2) Means in Sanskrit, "enlightened."

men as a fight among rats and cats? All(1) occasions like the present festival, which (tend to) unite the whole country, must be welcome. So saying the Professor concluded his speech. Afterwards Professor Jinsiwale said: If no one blames Napoleon for committing two thousand murders in Europe, (and) if Cæsar is considered merciful though he needlessly committed slaughters in Gaul (France) many a time, why should so virulent an attack be made on Shri Shivaji Mahárája for killing one or two persons? The people who took part in the French Revolution denied that they committed murders and maintained that they were (only) removing thorns from (their) path. Why should not the same principle (? argument) be made applicable to Mahárashtra? Being inflamed with partisanship, it is not good that we should keep aside our true opinions. It is true that we must (*i.e.*, should not hesitate to) swallow down our opinions on any occasion when an expression of them might be thought detrimental to the interests of the country (*i.e.*, nation), but no one should permit his real opinions to be permanently trodden under foot. Professor Jinsiwale concluded his speech by expressing a hope that next year there will be witnessed greater unity amongst the various parties in Poona on the occasion of this festival.

After the conclusion of Professor Jinsiwale's speech, the President, Mr. Tilak, commenced his discourse. It was needless to make fresh historical researches in connection with the killing of Afzulkhan. Let us even assume that Shivaji first planned and then executed the murder of Afzulkhan. Was this act of the Mahárája good or bad? This question which has to be considered should not be viewed from the stand-point of even the Penal Code or even the Smritis of Manu or Yajnyavalkya, or even the principles of morality laid down in the western and eastern ethical systems. The laws which bind society are for common men like yourselves and myself. No one seeks to trace the geneology of a Rishi, nor to fasten guilt upon a king. Great men are above the common principles of morality. These principles fail in their scope to reach the pedestal of great men. Did Shivaji commit a sin in killing Afzulkhan or how? The answer to this question can be found in the Mahábhárat itself. Shrimat Krishna's advice (teaching) in the Gitá is to kill even our teachers (and) our kinsmen. No blame attaches (to any person) if (he) is doing deeds without being actuated by a desire to reap the fruit (of his deeds). Shri Shivaji Mahárája did nothing with a view to fill the small void of his

(1) This sentence may also be rendered thus: "The more the occasions like ..... the whole country, the better."

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own stomach (*i.e.*, from interested motives). With benevolent intentions he murdered Afzulkhan for the good of others. If thieves enter our house and we have not (sufficient) strength in our wrists to drive them out, we should without hesitation shut them up and burn(1) them alive. God has not conferred upon the *Mlechhas*(2) the grant inscribed on a copper-plate of the kingdom of Hindustan. The Mahárája strove to drive them away from the land of his birth; he did not thereby commit the sin of coveting what belonged to others. Do not circumscribe your vision like a frog in a well. Get out of the Penal Code, enter into the extremely high atmosphere of the Shrimat Bhagavat Gitá, and (then) consider the actions of great men. After making the above observations in connection with the original theme, Mr. Tilak made the following remarks relating to the concluding portion of Professor Bhanu's address:—A country which (*i.e.*, a people who) cannot unite even on a few occasions should never hope to prosper. Bickerings about religious and social matters are bound to go on until death; but it is most desirable that on one day out of the 365 we should unite at least in respect of one matter. To be one in connection with Shivaji does not mean that we are completely to forget our other opinions. For quarrelling there are the other days of course. We should not forget that Ram and Ravan felt no difficulty whatever to meet in the same temple on the occasion of worshipping (the god) Shankar. After the lecture, *pada* (verses) of the Sanmitra Samáj and Mahárashtra Mela were sung, and this brought the second day's (celebration) to a close.

On the third day Professor Jinsiwale delivered a very long lecture which was replete with information. As it is not at all possible to express Professor Jinsiwale's address in a brief space, we cannot give even a summary of it to-day. We are glad to say that the *Kirtan* of the pious Ghamande was, as usual, worth hearing. He took up the same story (subject) of the assassination of Afzulkhan, and though it was (narrated) in the old style, it was full of new thoughts, as is usually the case with the Báva (*i.e.*, preacher).

The Judge charged the jury as follows:—

STRACHEY, J.—Gentlemen of the Jury,—The two accused, Bal Gangadhur Tilak and Keshav Mahadev Bal, are here arraigned before you upon two charges. Each of them is charged, in the first place, with having excited feelings of disaffection towards the

(1) The text of "burn alive" may on the authority of Molesworth's Dictionary be translated "oppress or torment (them) exceedingly."

(2) The generic term for a barbarian or foreigner, that is, for one speaking any language but Sanskrit and not subject to the usual Hindu institutions.

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Government established by law in British India. Each of them is also charged with having attempted to excite feelings of disaffection towards the Government established by law in British India. And they are charged with doing these things by means of certain articles appearing in a newspaper called the *Kesari* of the 15th June of this year. Before going into any other part of the case, it is necessary to explain to you what is the responsibility of these persons, if any attaches to them, in respect of these articles; and, secondly, we will proceed to consider what is the nature of the offence with which they are charged. I have directed that copies of section 124A of the Indian Penal Code should be distributed among you, and if they have not already been distributed, this will presently be done. The section, you will observe, defines the offence of exciting, or attempting to excite feelings of disaffection. It has been held by the late Chief Justice of Calcutta, Sir Comer Petheram, that it is not only the writer of the alleged seditious article but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government that is liable under the section, whether he is the actual author or not; and I entirely agree with him. The question is, whether the accused used words printed in a newspaper for the purpose of exciting disaffection towards the Government. That is what you have to consider.

The matter complained of consists of two articles published in the *Kesari* of the 15th June. As to the preliminary question of the connection of the accused with these articles, I will take the case of the prisoner Tilak first. The *Kesari* is a weekly paper published in Maráthi every Tuesday at Poona. It has a considerable circulation, having six or seven thousand subscribers, not only in Poona, but in many other places, including Bombay. This particular issue of the 15th June contained these two articles, and it was sent by post from the office at Poona to the subscribers in Bombay and elsewhere. So the paper's publication extended to Bombay. I only mention this matter of publication in Bombay, because it gives this Court jurisdiction to try this case. Sending the newspaper by post from the office where it is published to other places constitutes in law the publication in Bombay or any other place to which it is so sent. It is not denied by the defence that there was this particular publication in Bombay. It is in evidence that a copy of the paper containing these articles was sent from the office, and posted at Poona on the 15th, and reached a particular subscriber at Bombay on the 16th of June. The prisoner Tilak is the proprietor and editor of that paper, and he is also the publisher. He has not

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attempted to dispute that, but has admitted it. He has also, in his statement before the committing Magistrate, admitted that he was cognisant of the fact that the paper was despatched to various places, including Bombay. It is further in evidence that before any matter is published in the *Kesari*, proofs are submitted to him. Upon the evidence you would be justified in holding that he is the publisher of this paper, and also the publisher of these particular articles in the paper. He has signed a declaration under an Act which the Legislature passed in 1867, and that declaration is in evidence. The Act requires the publisher of every newspaper to make a certain declaration that he is the publisher of it. The declaration in regard to the *Kesari* was made by Tilak sometime in 1887. The law says that that may be taken as sufficient *primâ facie* evidence that the person signing the declaration is the publisher of every part of any paper, bearing a name corresponding to that mentioned in the declaration. And, therefore, under that Act, in the absence of any evidence to the contrary, you will be justified in holding that the prisoner Tilak was the publisher of every article and every word in the *Kesari*. He published it through his servants; and it must be taken as a fact, until the contrary is proved, that he authorised them not only to print it, but to give it out to the world and to distribute it in Poona and various other places, among them being Bombay. You will be justified in holding, in the absence of any evidence to the contrary, that Tilak was the publisher, and that he published these particular articles at Bombay by causing the paper containing them to be sent to and distributed in Bombay through his agents on the 15th of June. The prisoner has not disputed, but on the other hand has boldly avowed, his connection with the paper. He has not attempted to shirk any responsibility which attaches to him in respect of these articles. So much with regard to the responsibility of Tilak.

Now I turn to the question of the responsibility of the other accused person Bal, who takes up a different position altogether. He has admitted in the statement which he has handed to the Court that he was the acting manager of the paper in June last. He had been acting for sometime in the place of the substantive holder of the office, who had been absent since last October. The second accused was officiating for that person. Letters signed by him "for manager" have been put in. In one letter he describes himself as "acting manager." He was head printer also of the Arya Bhusan Press, where the *Kesari* and the *Mahrátta*, also belonging to the prisoner Tilak, are printed. As the acting manager he superintended the printing of the paper, because he was also acting printer.

He is not the registered printer. It is further in evidence, and witnesses for the Crown have told you, what was the practice in the office with regard to printing matter for publication. Bal used to receive manuscripts, and he used to make them over to the compositors and when proofs were handed to him he sent them to Tilak. He does not deny that. He is the officiating manager, he is the officiating printer, and he is the person through whose hands proofs ordinarily passed, and he was occupying that position on the 15th of June. Observe what he says in his statement that, although the proofs passed through his hands, it was not his business to correct them. He says that he was a paid servant, receiving only Rs. 30 per month. It was not his duty to pay attention to or correct the proofs that passed through his hands, which were corrected by a corrector and then submitted to Tilak. That statement of his is borne out by the evidence of the witnesses for the Crown. The witnesses say that it was not his business to examine the proofs. They were corrected by a corrector. That, in a nut-shell, is the evidence of the part taken by the second accused in bringing out these articles. Apparently the literary department was not under his control. That being the state of facts, how have you to deal with the question of his responsibility? You have to deal with it in this way. As he was the manager and superintendent in bringing out the matter—which was distinct from having a control over the literary department—as he was the printer of it, you may presume that he was acquainted with what he was printing and distributing. You have to find whether he authorised the insertion of these articles or their distribution. It is a pure question of fact. If you are not satisfied that the prisoner was cognisant of the particular articles, or that he directed or authorised the insertion or distribution of them, then I will advise you to find him not guilty, because you must have regard to the section, which requires distinct proof by the Crown against him. You must be satisfied that for printing or using the words that were published, he was responsible, and that he used those words for the purpose of exciting disaffection. If you come to the conclusion that he knew nothing about these articles, then it is a question for you to consider whether you can properly say that he used those words with that purpose in his mind. It is entirely for you to consider whether you believe Bal's uncontradicted statement that he was absolutely ignorant of what appeared in these articles.

But this does not apply to Tilak. He stands in a different position. Tilak was the proprietor and publisher of the paper, and he must be taken as authorising the publication of everything

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appearing in the paper. No evidence has been called on his part to refute or rebut that position. He must be presumed to have been cognisant of what was published in his paper. * * * * If you are satisfied that the two prisoners, or either of them, are responsible for the publication of these two articles in the *Kesari*, the next question is whether that makes either of them guilty of an offence under section 124A of the Penal Code. Did they or either of them, by means of the articles, excite or attempt to excite in their readers feelings of disaffection to the Government established by law in British India? That is a question of the meaning and effect of the articles, and the intention of the accused in publishing them, and it is entirely and exclusively a question for you to decide. But there is a preliminary question to be considered, and that is, what is the meaning of section 124A of the Penal Code, and what is the nature of the offence which it makes punishable? That preliminary question is for me to decide. The Code of Criminal Procedure requires you to accept from me the explanation of the section and of the offence—if my explanation is wrong, the responsibility rests upon me and me alone—and it is then for you to determine, upon the evidence before you, whether the facts constituting the offence as explained by me have been established, and whether the prisoners are guilty or not.

Now, I come to deal with the law as contained in section 124A of the Indian Penal Code, and before I read it I would point out that there are certain matters which I shall ask you to dismiss altogether from your minds. In the first place, in construing the section I do not propose to discuss the English law of seditious libel, though I have most fully considered the cases to which Mr. Pugh has referred, and the writings of Sir James Stephen and others on the subject. I believe that the explanation which I shall give you is not in any way inconsistent with the best English authorities; but in England the offence of seditious libel is not a statutory offence defined by Act of Parliament, but a common law misdemeanour elaborated by the decisions of Judges. In this country the law to be applied is the Penal Code. I will now ask you to look at the section and the way it is worded. It says: "Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life, or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine." To the above is appended the following explanation:—"Such a disapprobation of

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the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause." You will observe that the section consists of two parts: first, a general clause, and then an explanation. The object of the explanation is a negative one, to show that certain acts which might otherwise be regarded as exciting or attempting to excite disaffection, are not to be so regarded. We must, therefore, first consider the first or general clause of the section by itself, and then see how far the explanation qualifies it.

The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are "feelings of disaffection"? I agree with Sir Comer Petheram in the *Bangobasi Case* that disaffection means simply the absence of affection (1). It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. "Disloyalty" is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment: if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will, of course, find him guilty. But if you should hold that

(1) This should have been "the contrary of affection": *See* I.L.R., 19 Calc., at p. 44. "Disaffection means a feeling contrary to affection, in other words, dislike or hatred." "Disaffection" is defined in the New English Dictionary as "absence or alienation of affection or kindly feeling, dislike, hostility, political alienation or discontent, a spirit of disloyalty to the Government or existing authority": in Latham's edition of Johnson as "dislike, ill-will, want of zeal for the Government, want of ardour for the reigning prince": in Webster as "state of being disaffected, alienation or want of affection or good will, unfriendliness, disloyalty," with synonyms: "dislike, disgust, unfriendliness, ill-will, alienation, disloyalty, hostility."—A. S.

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that charge is not made out, and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places on absolutely the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find that either of the prisoners has tried to excite such feelings in others, you must convict him even if there is nothing to show that he succeeded. Again, it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section, and to a misapplication of the explanation beyond its true scope. Lastly, the authority or institution against which it is an offence to excite or attempt to excite feelings of disaffection is "the Government established by law in British India." What is the meaning of that expression? It means, in my opinion, British rule and its representatives as such,—the existing political system as distinguished from any particular set of administrators. The result is that you have to apply this test to the case of each of these two prisoners: did he, by these articles, try to excite in the minds of their readers feelings of disloyalty or enmity to the Government?

Now I come to the explanation to section 124A, and the question is how far it qualifies the section as just explained by me, and whether it supplies you with any other test to apply to these articles. Let us read the explanation again :—"Such a disapprobation of the measures of the Government as is computable with a disposition to render obedience to the lawful authrority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation, is not an offence within this clause." Let us consider each part of this explanation, as we have considered each part of the first clause. Observe first that, as I have already said, while the first clause shows affirmatively what the offence made punishable by the section is, the explanation states negatively what it is not : it says that something "is not disaffection," and "is not an offence within this clause." Therefore, its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the explanation is "the making of comments on the measures of the Government" with a certain intention. This shows that the explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as "the making of comments on the measures of the Government." It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives, or its feelings towards the people, then you must put aside the explanation altogether, and apply the first clause of the section. In the next place, supposing that you are satisfied that these writings can fairly and reasonably be construed as "comments on the measures of the Government" and not as attacks upon the Government itself, still you cannot apply the explanation unless you believe that such comments

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were made with the intention of exciting only "such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority." This, you will see, draws a distinction between attempting to excite feelings of "disaffection" to the Government, and intending to excite only a certain species of "disapprobation" of Government measures; and protects the latter only. What is the meaning of "disapprobation" of Government measures as contrasted with "disaffection" to the Government? I agree with Sir Comer Petheram that while disaffection means the absence of affection or enmity, disapprobation means simply disapproval; and that it is quite possible to like or be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him.

The object of the explanation is to protect honest journalism and *bonâ fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction, he has nothing to fear. It seems to me that this view of the law secures all the liberty which any reasonable man can desire, and that to allow more would be culpable weakness, and fatal to the interests not only of the Government but of the people. But now there are other words in the explanation which we have still to consider.

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To come within the protection of the explanation a writing must not only be the making of comments on Government measures with the intention of exciting only disapprobation of them as distinguished from disaffection to the Government, but the disapprobation must be "compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority." What that means is that even exciting disapprobation of Government measures may be carried too far. For instance, if a man published comments upon Government measures which were not merely severe, unreasonable or unfair, but so violent and bitter, or accompanied by such appeals to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government, and if it could fairly be gathered from the writing as a whole that the writer or publisher intended these results to follow, then he would be guilty under the section and would not be protected by the explanation. Observe the nature of this "disposition," which makes the whole difference between a "disapprobation" of measures which amounts to "disaffection" to the Government, and a disapprobation which does not. It is not merely "a disposition to render obedience to the lawful authority of the Government." It is a disposition both to render obedience and also to support the lawful authority of the Government against unlawful attempts to subvert or resist it. And it is a disposition to support that lawful authority against unlawful attempts not only to "resist" it—that is, to oppose it—but also to "subvert" it—that is, to weaken and undermine it by any unlawful means whatever. And, lastly, it is a disposition to support the Government against all such unlawful attempts whenever occasion may arise, not only against any particular unlawful attempt proceeding or impending at the time of the publication. I believe that it is an inaccurate reading of this part of the explanation, a too exclusive attention to the expressions about obedience and resistance, and an insufficient attention to other expressions equally important, which has caused some people to misunderstand the whole section, and to imagine that no one can be convicted under it even if he assails the Government itself, and not merely Government measures, unless he counsels or suggests rebellion or forcible resistance.

You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they

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intend to excite in the mind of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures? Or did they intend to excite no feeling adverse either to the Government or its measures, but only to excite interest in a poem about Shivaji and a historical discussion about his alleged killing of a Mahomedan general? These are the questions which you have to consider. But you may ask, how are we to ascertain whether the intention of the accused was this, that, or the other? How can we tell whether his intention was simply to publish a historical discussion about Shivaji and Afzul Khan, or whether it was to stir up, under that guise, hatred against the Government? There are various ways in which you must approach the question of intention. You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence, such as the articles about the plague and the Diamond Jubilee and so forth. But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself. What is the intention which the articles themselves convey to your minds? In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed. Read these articles, and ask yourselves how the ordinary readers of the *Kesari* would probably feel when reading them. Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a poem and a historical discussion about Shivaji and Afzul Khan and so forth? If you think that the only feelings which such readers would be excited to are feelings of interest in a poem or a historical or ethical discussion, then you may presume that that is all the accused intended to excite. If you think that such readers would naturally and probably be excited to entertain feelings of enmity to the Government, then you will be justified in presuming that the accused intended to excite feelings of enmity or disaffection. As a matter of common sense a man is presumed to intend the natural and ordinary consequences of his acts: he cannot, speaking generally, say: Although this language would have the natural and ordinary effect of exciting feelings of disaffection, I did not, when publishing it, intend that it should do so. But in considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other

circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impresss on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication. An article which, if published in England, or among highly educated people, would produce no effect at all—such as an article on cow-killing—might, if published among Hindus in India, produce the utmost possible excitement. An article, which, if published at a time of profund peace, prosperity and contentment, would excite no bad feeling, might, at a time of agitation and unrest, excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opinion, it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yacht Club in Bombay; but what you have to consider is their effect, not upon Englishmen or Parsis or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they are circulated and read—Hindus, Maráthas, the inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time, not in the year 1890 or 1891, or 1892 or 1893, or even 1896, but in June 1897, when these articles were disseminated among them. Then you have to look at the standing and the position of the prisoner Tilak. He is a man of influence and importance among the people; he would be in a position to know what effect such articles would probably produce in their minds. Would then the readers of the *Kesari*, at that time, and in the then existing state of the country and of public feeling, regard the articles as a poem and a historical discussion applying no moral to the British Government here and now, or would they be excited by them to feelings of enmity to the Government?

But in the next place, in judging of the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your common sense, your knowledge of the world, your understanding of the meaning of words, and your experience of the way in which a man writes when he is animated by a particular feeling. Read the articles, and ask yourselves, as men of the world, whether they impress upon you on the whole as a mere poem and a historical

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discussion without disloyal purpose, or as attacks on the British Government under the disguise of a poem and historical discussion. It may not be easy to express the difference in words; but the difference in tone and spirit and general drift between a writer who is trying to stir up ill-will and one who is not, is generally unmistakable, whether the writing is a private letter, or a leading article, or a poem, or the report of a discussion. You can form a pretty accurate notion of what a man is driving at or what he wants to convey, from a perusal of the writing and can generally tell whether the writing is inspired by good-will or is meant to create ill-will. It is not very difficult to distinguish between the language of hostility and the language of loyalty and good-will or of criticism and comment. You must ask yourselves, having read the articles, whether the writer or publisher is trying to stir up the feelings of his readers against the Government, or is trying to do something altogether different. If the object of a publication is really seditious, it does not matter what form it takes. Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. You have to look through the form and look to the real object: you have to consider whether the form of a poem or discussion is genuine, or whether it has been adopted merely to disguise the real seditious intention of the writer. Again, in judging of the intention of the writer or publisher, you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference to the context. You must consider each passage in connection with the others and with the general drift of the whole. A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles. It is this general character and tendency that you must judge the intention by looking at every passage so far as it throws light upon this. You have heard much discussion as to the exact meaning of various expressions in these articles and the best way of rendering certain passages into English. You must remember that there has been a dispute about the correctness of some of the translations which have been put before you. For most of you the documents that you have to deal with are, in their original form, in a foreign language. I do not intend to trouble you with any criticism of the various renderings which are in evidence. The discussions which have taken place on the subject are, I assume

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within your recollection. They no doubt, were necessary, and it is important that we should, as far as possible, exactly understand the true meaning of every word. But it would be a great mistake to let the decision of this case turn upon mere verbal niceties of translation or discussion as to the best English equivalents of particular Marathi terms. We must look at these articles, not as grammarians or philologists might do, but as the ordinary readers of the *Kesari* would look at them—readers who are impressed not by verbal refinements but by the broad general drift of an article. Two translations have been put before you, one of which has been called a free and the other a literal translation. Both are equally official translations. What I would advise you is that wherever there is no dispute about the accuracy of the free translation, where its rendering has not been challenged, you should be guided by the free translation. It is altogether a mistake to suppose that because, a translation is literal, it is more correct than the translation which is called free. It does not follow that the most literal translation of a passage is that which best conveys its meaning in English. What we want to get at is the way in which an ordinary reader would understand the whole article, and hence to gather the intention with which the article was written and published. An absolutely literal translation from one language to another may give in the second language an extremely imperfect and really inaccurate idea of the meaning and spirit of the original. These documents have been translated by a translator of the Court, a Hindu gentleman, whose capacity to translate cannot for one moment be doubted. The accuracy of his literal rendering of the articles has not been challenged by the defence; but the defence have found fault with the free translation as regards certain expressions occurring in the articles. The free translation does not profess to give the absolutely literal meaning of the words, but their real genuine equivalents in English. As I have said, where the accuracy of the free translation is not disputed, I advise you to be guided by that where there is any dispute, I advise you to compare the literal with the free translation, to look at the content of the disputed passage, and to judge, by reference to that, which conveys the true meaning and intention. Again, where there is a conflict of evidence as to the meaning of a particular expression, I would advise you to give, under the usual rule, the benefit of any reasonable doubt to the accused. Were the accused publishing a harmless poem and historical discussion, or were they using the form of a poem and historical discussion for the real purpose of exciting enmity to the Government? In dealing with this

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question, as with all others in a criminal case, you must remember to give the accused the benefit of any reasonable doubt, and to give the articles not only fair but a liberal and generous consideration. You must remember that the prosecution have to establish against the accused that the construction of the articles which they have put forward is the true one. In all cases, and whether the charge is one of sedition or murder or any other offence, the prosecution have to prove their case; and here they have to prove their construction of the articles, and to prove that the articles were published by the accused with the intention of exciting disaffection.

I will now come to the articles, but in doing so I wish you to bear in mind the nature of the Shivaji controversy.

[His Lordship then proceeded to analyse and comment upon the articles and concluded by asking the jury to give the matter an impartial consideration.]

[The jury by a majority of six to three found the first prisoner guilty, and they unanimously acquitted the second.

The first prisoner having been convicted, subsequently applied under clause 41 of the Amended Letters Patent, 1865 (1), for leave to apply to the Privy Council.]

1897.
September, 24.

The application was heard by a Full Bench consisting of FARRAN C. J., Candy and Strachey, JJ., on the 24th September and the Judgment of their Lordships was delivered by

FARRAN, C. J.—The question to be decided in this case is whether in the opinion of this Court this is a fit case for appeal to Her Majesty in Council. In reference to that it must be remembered that the Privy Council have themselves laid down certain rules which guide them in considering whether appeals in criminal cases are fit cases for appeal or not, and that they have expressly decided that there is no general appeal in

(1) Clause 41 :—

"And we do further ordain that from any judgment, order, or sentence of the said High Court of Judicature at Bombay made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to us, our heirs or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advise of our Privy Council hereafter make in that behalf."

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criminal cases. It is only when an important or doubtful question of law arises, or when there has been a miscarriage of justice, that they will deal with appeals in criminal cases. I think this will include nearly all cases—excluding for the moment questions of the absence of jurisdiction—in which appeals have been allowed by the Privy Council. Therefore, we have to apply our minds to consider whether in this case there is an important question of law to be considered, whether there has been a miscarriage of justice, and also whether there has been any want of jurisdiction shown in the committing Magistrate or the High Court.

Now, as to the question of jurisdiction, we are all of opinion without doubt that this prosecution was instituted under the authority of Government, and that, to use the words of the present Code (Act X of 1882), this complaint was made "by order of or under the authority of Government." There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government Solicitor, it was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint. Now though the complaint must undoubtedly contain the article complained of to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint—if written order is required—must specify the exact article in respect of which the complaint is to be made. Therefore we think that it would be puerile on that point to send the case before another tribunal.

The other ground upon which Mr. Russell has asked us to certify that this is a fit case to be sent to Her Majesty in Council, is that there has been a misdirection, and he based his argument on one major and two minor grounds. The major ground was that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section and we need not say more upon that ground. The first of the minor points is that Mr. Justice Strachey in summing up the case to the jury stated that disaffection meant the "absence of affection." But although if that phrase had stood alone it might have misled the jury, yet taken in connection with the context we think it is impossible that the jury could have been misled by it. That expression was used in connection with the law as laid down by Sir Comer Petheram in Calcutta in the *Bangabasi Case*. There the Chief Justice, instead of using the

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words "absence of affection," used the words "contrary to affection." If the words "contrary to affection" had been used instead of "absence of affection" in this case, there can be no doubt that the summing up would have been absolutely correct in this particular. But taken in connection with the context it is clear that by the words "absence of affection" the learned Judge did not mean the negation of affection, but some active sentiment on the other side. Therefore, on that point, we consider that we cannot certify that this is a fit case for appeal.

In this connection it must be remembered that it is not alleged that there has been a miscarriage of justice.

The last minor point was with reference to the definition of the word Government. This is a very minor point in the case, but striking out the words which Mr. Russell has alluded to, but which were not in the original summing up(1), we cannot see that there has been any misdirection as to the meaning of the word Government. We, therefore, think that the application must be refused.

Application refused.

[An application for special leave to appeal to the Judicial Committee of the Privy Council was subsequently made in this case and was refused. See, L. R. 25 I. A. 1 ; I. L. R. 22 Bom. 528.]

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(1) In the copy of the charge annexed to the petition for leave to appeal, the definition of the words in section 124 A of the Penal Code, "the Government established by law in British India" was given thus :—"It means, in my opinion, British rule and its representatives *and administrators* as such—the existing political system as distinguished from any particular set of administrators." In the charge as delivered the words here italicised "*and administrators*" were not used. The sentence should be, "It means, in my opinion, British rule and its representatives, as such—the existing political system as distinguished from any particular set of administrators"—I. L. R., 22 Bom., 151.

[Meaning of the term "disaffection" was explained in *Queen-Empress* v. *Amba Prasad*, I. L. R. 20 All. 55, and *Queen-Empress* v. *Ramchandra*, I. L. R. 22 Bom. 152 (156), F. B.]

GANOURI LAL DAS.

v.

THE QUEEN-EMPRESS.

[*Reported in I. L. R., 16 Calc., 206.*]

1889.
January, 14.

The Judgment of the High Court (PIGOT AND MACPHERSON, JJ., was as follows:—

This case comes before us in revision.

Ganouri Lal Das, Dursan Lal Das, Koonjal Jetti, Murat Singh, and Moonshi Singh were convicted, under s. 147 of the Indian Penal Code, of the offence of rioting, by the Deputy Magistrate of Bhagalpur, and sentenced to undergo one year's rigorous imprisonment each, and were further directed in the words of the sentence "to execute recognisance bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each."

On appeal to the District Judge the conviction and sentence were confirmed, and on the 28th November this rule was obtained in this Court, calling on the District Magistrate to show cause why the conviction and sentence should not be set aside. The prisoners were released on bail pending the hearing of the rule.

One member of the present Bench not having sat in the Bench which granted the rule, we heard the rule opened at length by Mr. Woodroffe for three of the petitioners and also heard Mr. Evans for the other two. Cause was then shown by Mr. Phillips against the rule, and Mr. Evans was heard in reply for all the petitioners.

The case was argued at great length; we do not say at too great length, having regard to the importance of some of the questions raised before us.

The chief question discussed before us was, whether the acts of the persons convicted did, under the circumstances of the case, come within the provisions of the Indian Penal Code relating to the offence of rioting?

The disturbances, out of which this conviction arose, took place on the 24 June, at a spot on the river Karalya, close to where a water-course, called the Sanis Daur (or otherwise the Raggahai Khurra), issues from that river.

Around this spot, and on both sides of the river, are lands belonging to Mohashoy Taruk Nath Ghose, of whose *cutchery* Ganouri Lal is *tehshildar* and Dursan Lal is *patwari*; the other three petitioners appear to be *peadas* of the same *cutchery*; the Mohashoy is

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described in the petition in this case as the "master" of the petitioners.

Some distance (about two miles) from the point where the *Daur* issues from the river are the lands of Fazilpur, 6 annas of which were bought in 1293 F. S. by the Thakurs' family of Barari. These lands are irrigated by the water-course, which appears to be supplied from the river alone.

The disturbance of June 24th took place in consequence of a number of persons having on that day gone, under the direction of servants of the Thakurs, to the place where the water-course issues from the river, and having, just below the point of junction, *bunded* up the course of the river (which was then dry or almost dry) for the purpose of diverting the waters of the stream into the water-course. It has been a matter of dispute in the case whether or not there was there at the time a *bund* partially washed away, which these persons repaired or attempted to repair; or whether what they went to do was to construct a *bund*, there being none actually there at the time; and it was denied on the part of the Mohashoy's people that a *bund* had ever been at this spot. The Deputy Magistrate (whose finding we refer to only because it is referred to by the District Judge) holds that the Thakurs' people went "to construct a new *bund* as the one which stood there before was washed away." The District Judge says "they went to renew a *bund* which had been entirely washed away or else to repair one which had been partially washed away:" adding, for the purposes of this case, "it is hardly material to inquire which."

The District Judge finds that such repairs had been before the Thakurs' purchase constantly made by the Fazilpore *Zemindars*, aided by the proprietors of adjacent villages, and that the Thakurs in proceeding to repair or renew the embankment were acting in the *bonâ fide* belief that they were entitled to do so. The Thakurs' people went in considerable numbers, apparently coolies, save five or six *peadas*. The District Judge finds that they were not more in number than was necessary for the purpose of repairing the *bund*, for which purpose they went; that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.

The party arrived at the spot at about 10 A. M. (two *ghurries* of the day), and worked at the *bund* until the afternoon, by which time they had raised it to a considerable height; and also made it of

considerable width. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood, and marching towards the spot with drums or tom-toms beating. The Thakurs' men sent a messenger to Bhagulpur Thannah, about 10 or 12 miles off, who, however, did not reach it until 11 P. M.

At about 4 P. M. the bodies of men, previously seen gathering, came together to the number, as stated, of 1,200 in all, many of them armed with *lathis*, to where the work was going on, headed by the petitioners. Most of the Thakurs' party had either left, or then fled, and very few were left. Twenty-five or thirty men detached themselves from the main body and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathi* blows, and three left senseless on the ground. The assembly then dispersed. It is contended that these acts do not amount to rioting under the Indian Penal Code in the present case.

The Mohashoy's people wholly denied any right on the part of the Thakurs to construct or repair or to have in existence, in the river bed, any *bund* such as the Thakurs claimed. They had expressly denied the existence of any such right, and refused permission to the Thakurs to exercise it. They had done so, in communications which passed between the two *Zemindars*, in October and November, 1887.

The District Judge thought the evidence of these communications inadmissible as hearsay. We think they were admissible; although we do not think that, upon the fair construction of them, they at all negative the existence of that *bonâ fide* belief on the part of the Thakurs in the right in respect of the *bund*, which the District Judge finds they had.

It is plain that on the part of the petitioners' master, the Mohashoy, the Thakurs' alleged right was strenuously denied; or, to put in different words his contention, his right to have the channel of the river free and unobstructed by any *bund*, was strenuously asserted by him—a right in which, it may not be improper to remark, his villagers probably were interested as well as their landlord.

It is contended, under these circumstances, that the assembly of which the petitioners were members was not an unlawful assembly.

It is pointed out, with perfect justice, that they have not, nor has any one of them, been found guilty of inflicting the wounds, or any of the wounds inflicted on members of the Thakurs' party; so that, if they were not members of an unlawful assembly, they must go free.

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It is argued that the interference by the Thakurs' people with the channel of the river justified the assembly in coming to stop them from working there, and the show and the use of force in compelling them to do so. It was not expressly contended that the amount of injury inflicted on the persons wounded was, such as it was, within the right of the assembly to inflict; it was argued that it would not be fair to use the violence employed as evidence of an unlawful purpose in the coming of the assembly.

But the right under the law to use force was asserted in argument.

This contention was founded, partly on the words of the Indian Penal Code and partly on some of the decisions on that enactment.

It could hardly be supported, we venture to think, upon any supposed policy contemplated by the framers of the Code. The intention can hardly be imputed to the eminent persons who framed, or to the Legislature which enacted the Code of legalising, in certain cases, the levying of private war. We apprehend there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or that, executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable.

Dalton's Justice of the Peace, in a passage constantly cited (as, for instance, in Burns, J. P., "Riot"), pp. 445-446, ch. 137:—

"Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing; or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir, and made a trench in his land, that they did erect the weir, to turn the water, so as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry, nor yet any riot.

"But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other; or they will do it though they die for it, or such like words), or shall use any other behaviour, in apparent

disturbance of the peace, then it seemeth to be a riot; and, therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful."

Russell, 4th Edition, Vol. I., 380:—"But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like), or in any other way behave in apparent disturbance of the peace, it seems to be riot.....If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not."

The latter part of this passage is taken from Chief Justice Tindal's charge to the Stafford Grand Jury in 1842 (1).

We have, of course, to consider whether the Indian Penal Code has by omission or expression made a sort of violence or threat of violence lawful in India, which is criminal in England. The sections of the Code relating to the right of private defence of property were referred to.

Section 97, paragraph 2, is that which recognises in certain cases this right; and ss. 103, 104 and 105 lay down the limitations of it.

The first and leading characteristic of the right is, that it exists as against an act of theft, robbery, mischief, or criminal trespass, or an attempt to commit one of those offences. No such right is conferred, by any words in these sections, save as against the perpetrators of offences under the Penal Code. The Code confers a right of private defence not as against mere trespass, but as against crime.

(1) C. & M., 663.

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That is the general scope of it. There may perhaps arise cases of difficulty; cases *inter apices juris* must always, from time to time, arise, and when they do, be dealt with. But this is not such a case. Upon the findings of the District Judge, we must take it, that no offence was committed by the Thakurs' people. The matter does not rest there. The District Judge says that no case was made for the petitioners in the first Court of the exercise of the right of private defence. Nor was it. The defence made was, so far as it touched this question at all, one of civil trespass only. Again, it is shown, and was on another aspect of the case pressed upon us by Mr. Woodroffe, that long after the disturbance, the *bund* remained as it was when the attack took place. There was no water in the river to be then diverted. There was no pressing immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities. Even apart from this the District Judge finds it clear that the working party had been observed early in the day before the work could have progressed far; but in place of having recourse to the authorities, the Mohashoy's party, acting with deliberation, assembled, after preparation, in great force, and went to stop the work at the *bund*. We do not think the right of private defence arose in this case.

Then it is argued that the assembly did not assemble to enforce a right or supposed right within the terms of section 141.

On the morning of the 24th the Mohashoy was, it is said, in the enjoyment and possession of the right claimed, namely to have the river channel free. When the assembly went there in the afternoon, they went not to enforce a right, but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. It was not intended by the Code to make assemblies which are assembled in support of the *status quo* unlawful. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. It is dangerous to attempt to lay down any general rule, and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very different matter. There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by section 141. What

it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

The section refers to "right or supposed right." This would seem to make a division into: (1st) rights in actual enjoyment when interfered with; (2nd) rights claimed, though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, &c., defends the right by restoring the *status quo ante* and with it the actual enjoyment.

If the proposition contended for be true, then, not merely the right to the actual occupation of property in physical possession, but a right of way, a right to draw water from a well, a right to enjoy ancient lights, and many others, may, if interrupted, be vindicated by force or show of force. So long as they are uninterrupted, they are in possession so far as such rights can be. To defend them by force against interruption is to enforce them; and this, if done by five or more is, in many if not in most cases, forbidden by the law.

This proposition, in truth, embodies the view which was expressed by Campbell, J., sitting alone, in the case of *Queen* v. *Mitto Sing* (1) in the passage at page 43, beginning with—"I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession." It is not the judgment of a Bench of this Court, and with great respect we dissent from this passage and from that which follows it, and decline to be bound by either.

Leaving the discussion of this general proposition which, if established, would be a defence in this case, we must refer to the judgment of Phear, J., in the Pachgachia case [*Shunker Singh* v. *Burmah Mahto* (2)] which was much relied on.

The Court there held that the right of private defence existed. The Pachgachia people were in "the enjoyment of the use of water which they were then having at the very time." The Amba people came to stop the water by force, if necessary. Phear, J., says: "They" (meaning the Pachgachia people) "were not bound under all circumstances to stand quietly by while their opponents wrongfully and by force committed serious mischief." We think we must take this as a finding upon the character of the

(1) 3 W. R., Cr., 41.
(2) 23 W. R., Cr., 25.

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act committed by the Amba people; and, that being the finding, the right of private defence arose, there not being time to have recourse to the authorities. The act of the Amba people was held to be an attempt to cause such a change in the property (the actual taking of the water then flowing being treated as property) as to affect it injuriously, and so to be an attempt to commit mischief.

Further, it appears on reference to the papers in the case, that the Pachgachia people had gone to keep their channel clear, and had remained on the spot during the night previous to the disturbance: they were actually in possession of the flow of water so far as that was possible; and the Amba people then came to stop it, and on the finding of the lower Court were the aggressors. Some of the language used in the case, no doubt, affords ground for the argument properly pressed upon us, that it decides in general terms that the maintenance of the actual subsisting enjoyment of a right is not the enforcement of a right within the meaning of s. 141. If the case could only be read as supporting that proposition, we should think it our duty to refer it to a Full Bench. We think, however, that it does not go so far as to decide that.

We understand the case of *Birjoo Sing* v. *Khub Lall* (1) also relied on to include a finding to a similar effect. Couch, C. J., says: "He (the petitioner) went there to do what persons had a right to do, *viz.*, endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly so as to be answerable for any acts of violence which were committed by the assembly or any member of it in prosecution of the common object."

In this case, therefore, also, the defence of what was held to be property, against what was held to be mischief, constituted the justification accepted by the Courts.

In the present case, if the right claimed by the Thakurs does exist, their people were lawfully engaged upon the *bund* and the *bund* was lawfully there. The petitioners were members of an assembly, the common object of which was by show of criminal force and by criminal force, if necessary, to enforce the right to keep the river channel clear, by preventing the construction of the *bund* and by demolishing it so far as it was constructed: though the demolition was not carried out after the effects of the violence used became apparent—a not unusual circumstance in this country. We think the case comes under s. 141, para. 4.

(1) 19 W. R., Cr. 66.

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We see no reason for holding that any omission in the charge occasioned a failure of justice in the course of the three months' trial which took place.

As to the *alibi* set up on behalf of prisoners 2 and 3, we see no reason to doubt that the District Judge fully considered the evidence bearing upon that question; and, so far as we may allow ourselves to express an opinion on the question of fact before him, we should say that we entirely agree with him. The letters are not satisfactory, and even if these accused were present at the well where the bodies are said to have been searched for on the day in question, that would not be inconsistent with their having been, as they were sworn to have been, at the riot afterwards.

We must discharge the rule to set aside the conviction.

But we think we are at liberty to diminish the severity of the sentence imposed. There was a serious question of right raised between the parties. The Thakurs' people stayed quiet after the refusal of permission in October-November until just before the rains were nigh; they were the persons to come on the ground with good reason to know they might be opposed. This does not furnish a justification for the accused; but it does, we think, entitle us to refrain from treating the case as one fit for the exemplary sentence imposed. We quite feel the importance of the District Judge's observations. But, under the circumstance, we think a sentence of six months' imprisonment will meet the ends of justice. We are happy that a line of argument in reply, which we feared might have rendered it impossible for us to reduce the sentence, was not pursued.

Subject to this reduction, we let the sentence stand as it is.

Rule discharged.

NOTE.

This case has been treated as an authority for the proposition that a person being peaceably in possession of a house, if a person goes in and takes possession without his leave, he commits a trespass and all trespass implies force in the eye of the law. *Kailash* v. *Jugal*, 1 C. L. J. I. 104. Cf. *Asher* v. *Whitlock*, L. R. 1 Q. B., 1.

If, however, persons are rightfully in possession of land and find it necessary to protect themselves from aggression, they are justified in taking precautions, and using such force as is necessary to prevent the aggression, see *Pachkauri* v. *Queen-Empress*, I. L. R. 24 Calc. 686; *Pareshnath* v. *Emperor*, I. L. R. 33 Calc. 295, 2 C. L. J., 516; *Queen-Empress* v. *Narsang*, I. L. R. 14 Bom., 441.

QUEEN-EMPRESS

v.

NAYAMUDDIN.

[*Reported in I. L. R., 18 Calc., 484. F. B.*]

1899. May, 19.

The Court (PETHERAM, C. J., PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ.) delivered the following opinions :—

PIGOT, J.—I am of opinion that the question referred to us should be answered in the negative. I think that, upon the finding cited in the reference, the case does not fall within the 5th exception to section 300 of the Penal Code.

The learned Judges referring the case say :—

"It has been found—and we see no reason to question the findings—that they were all guilty of rioting armed with deadly weapons, and that one of the accused, Nayamuddin, in the course of the riot and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, unless that act bears a less grave character by reason of exception 5 to section 300 of the Penal Code."

And also :—

"In this case it is found, and we accept the finding: 'The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men on accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one.'"

It is not found as a fact that the deceased did suffer death, or take the risk of death, with his own consent. If the case comes within the 5th exception, it can only do so, because the second finding above mentioned, read in connection with the other, leads by necessary inference to the conclusion that the deceased did within the meaning of the exception consent to suffer death or to take the risk of it, at the hands of any person who might be a member of the hostile party.

I own that as I read the cases of *Shamshere Khan* v. *Empress* (1) and of *Queen* v. *Kukier Mather* (2) there referred to, I think they do decide, that from such a finding as this, such a consent is to be

(1) I. L. R. 6 Calc., 154 (158). (2) Unreported.

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inferred : and I feel bound respectfully to dissent from them, if, and so far as, they do so decide.

It is not easy to construe the 5th exception : the wholly anomalous rule, which it lays down is expressed but in few words, unaided by definitions : but I think it is not going too far to say that it should receive a strict and not a liberal construction ; I mean that it should only be applied to cases which quite clearly fall within it.

I think the exception should be considered in applying it, first, with reference to the act consented to or authorized, and next with reference to the person or persons authorized. And I think that as to each of these, some degree of particularity at least should appear upon the facts proved, before the exception can be said to apply. I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time, but of mode of inflicting it, specifically consented to, as for instance in the case of *suttee*, or of duelling, which were no doubt, chiefly in the minds of the framers of the Code.

Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent being given. I do not doubt, that the consent may be inferred from circumstances and does not absolutely need to be established by actual proof of express consent.

In *Shamshere Khan* v. *Empress*(1) it is said :—" A man, who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life : and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk." In such a case the circumstances do show a distinct act of the mind of each combatant with respect to the other and *in concert with him* of willingness to encounter and suffer such known and anticipated acts of violence from that other as he cannot defend himself from. I am not sure that to include such a case within the exception is not rather to strain the terms of it, but I am not prepared to hold that here the exception would not apply.

But I think there is a distinction between such a case and that referred to in the following passage, at page 158 of the report of *Shamshere Khan* v. *Empress* (1), of the members of two riotous assemblies who " agree to fight together," and of whom some on each side are to the knowledge of all the members, armed with deadly

(1) I. L. R., 6 Calc., 154 (158).

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weapons. I do not think that from such a mere agreement to fight, such a consent as is contemplated by the section can be imputed to each member of each mob, to suffer death or take the risk of death at the hands of any one of the armed members of the other mob, by means of whichever of such deadly weapons, used in whatever way that person may please, and be able, to inflict it.

Whether or not the exception would apply if a fight were so carefully arranged before-hand, that the express consent of the members of each party to take the risk of death in the fight at the hands of the opposite party could be established, need not be here discussed. The present is not such a case, nor was either *Shamshere Khan* v. *Empress* (1) or *Queen* v. *Kukier Mather* (2) such a case.

But I should myself find great difficulty in holding that a general consent to take the risk of the lethal acts of each and all of the members of the opposing mob, could be such a consent as is contemplated by the exception, or that such a case would come within it at all. I confess that, unless compelled by very clear words, I should hesitate to give such a construction to this exception as should involve the proposition that the Legislature intended by it to confer a species of privilege upon the murderous acts of riotous assemblies, provided the members of them should add to their offence the further quality of deliberate premeditation in the commission of it.

PETHERAM, C. J.—I agree with the judgment which has just been read.

MACPHERSON, J.—I entirely agree with the judgment which has just been delivered by Mr. Justice Pigot.

O'KINEALY, J.—In this case the accused, five in number, were convicted of offences under sections 148, 304, 325, 302, and 149 of the Indian Penal Code by the Officiating Sessions Judge of Furridpur. He held that the fight in connection with which the prisoners have been convicted was premeditated and pre-arranged—a regular pitched battle or trial of strength between the Gujnaipur party and the men on the accused's side—and both sides were armed with spears and *lathies*.

On this statement of facts, the learned Judges who heard the appeal have referred to us the question, whether this finding brings the offence of the appellants within exception 5, section 300 of the Indian Penal Code, and reference has been made to the cases of the *Queen-Empress* v. *Rahimuddin* (3) and *Shamshere Khan* v. *The*

(1) I. L. R. 6 Calc., 154 (158). (2) Unreported.
(3) I. L. R. 5 Calc., 31.

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Empress(1) as directly in conflict upon the meaning to be attached to that exception.

Assuming that I am in a position to give a judicial decision upon the question now before us, of which I am not at all certain, I am of opinion that the finding of the Court below is not sufficient to bring the case of the prisoners within the exception. The exception states that "culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent." Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind. In other words, before this section can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death or take the risk of death, and this determination continued up to, and existed at, the moment of his death. It appears to me difficult to assert that when two parties armed with *lathies* and spears go out to fight, the members of each party consent to suffer death; nor can it, I think, be predicated, as a general rule, that they consent to take the risk of death.

In section 87 of the Indian Penal Code it is stated that "nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." Appended to this section there is the following illustration:—"A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence."

This section and illustration show what amount of evidence the Legislature considered sufficient to prove that a person injured had "consented to suffer the injury incurred." Applying that illustration to a few cases, I think we may arrive at something like a definite idea of what the Legislature intended by similar words in section 300, exception 5. If two men went out armed with rifles and fired at each

(2) I. L. R., 6 Calc., 154.

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other from a distance of 10 yards, and one of them was shot, then looking at the nature of the weapons and the short distance which separated them, I think, looking at the illustration to section 87, that a jury would be entitled to hold that they took the risk of suffering death. But as the existence of the consent at the moment the deceased received the fatal shot would be necessary in order that the accused should obtain the benefit of the exception, he could not succeed if the evidence pointed the other way. Thus, if the deceased decline to continue the fight, or ran away, or showed in any other open manner a desire to avoid his previous consent, the accused could not successfully appeal to this exception. On the other hand, if they were armed only with ordinary walking sticks, I think it would be extremely difficult for a Jury to hold that the parties had fully before them the idea that they were running any risk of death, or ever consented to suffer death. Between these two extremes there are numerous cases different in degree, in which it would be extremely difficult to state what was the mental attitude of the person whose death was caused when he was killed. If, as I have said before, the parties were armed with guns and were placed near each other, a jury might well find that they had undertaken the risk of death. If, on the other hand, there was only one or two guns amongst a great number of people, there would be much less room for the conclusion that the deceased considered there was any risk of death or consented to take it. So far as I can see, the nature of the weapons with which the parties were armed in this case is only one out of many facts from which the consent of the deceased should be inferred: and I myself would not come to the conclusion that any individual of either of the two parties consented to take the risk of death, when the evidence in support of that conclusion is simply that some of the men on both sides were armed with *lathies* and spears. No doubt in the case of *Queen* v. *Kukier Mather*(1), White, J., in delivering the judgment of the Court, said:—"A man, who by concert with his adversary, goes out armed with a deadly weapon to fight an adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life, and as he voluntarily puts himself, in that position, he must be taken to consent to incur that risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riotous assemblies who agree to fight together,

(1) Unreported.

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out of whom some on each side are to the knowledge of all the members armed with deadly weapons."

I do not understand the Judges in that case to decide that as a matter of law, such consent must be presumed in every case of rioting with deadly weapons, but rather that in that particular case the evidence warranted the conclusion. If I did understand them so to hold, I should be compelled to dissent. To my mind there is no presumption of law at all. The matter, as I think is pointed out by the illustration to section 87, is one of fact to be decided on the evidence given at the trial.

GHOSE, J.—The question we are called upon to decide is whether upon the finding cited in the reference, the case falls within the 5th exception to section 300, Indian Penal Code. That finding is as follows :—

"The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men of accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one."

I do not think that these facts are sufficient to show that Summiruddin, who was either killed or wounded, suffered death or took the risk of death with his own consent.

I observe that the Sessions Judge also finds that the rioters on both sides were armed with deadly weapons; but it is not found, whether only a few or a large number of the rioters on the side opposed to Summiruddin were armed with such weapons, nor has it been found that the man took a part in the battle with a full knowledge of the risk he was incurring, and that he continued to fight and did not attempt to retire until he was disabled. Upon the facts found, and confining myself to those facts, I am unable to say what was the attitude of Summirudin's mind at the time when he entered into the conflict, and whether that attitude continued till he received the fatal blow.

I do not think that any general rule of law can be laid down in a case like this; for it is, I take it, a question of fact, and not of law, to be decided upon the circumstances of each case.

There is an obvious distinction between suffering death and taking the risk of death with one's own consent; and that being so, different considerations would in many instances arise, according as the particular case comes under the first or second head of the 5th exception to section 300.

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In the case of a person who is said to have suffered death with his own consent, some definite circumstances both as to time and the mode of inflicting death, consented to—as in the case of a *suttee*—should, no doubt, as has been observed by Pigot, J., be proved. But I am disposed to think that this rule cannot always apply in the same way in the other case.

In the case of a person entering into a duel with another person, both being armed, neither of the combatants specially consents to being killed: each of them hopes to come out victorious, but knows fully well at the same time that he incurs the risk of being killed—so in other cases of the kind, where two persons in concert with each other deliberately fight with deadly weapons.

In such cases, I think, it can hardly be questioned that the exception would apply. If so, I do not see why, when the fight is between a person and two or more persons, or between two or more persons on either side, it cannot apply. There is nothing in the exception itself to indicate such a distinction.

Take this case: Two men, one each side, are determined and agree to fight each other until some one of them is killed or wounded. They use different weapons; the two on one side use a gun and a club respectively, and the other side a sword and spear. The fight is begun, and nothing is shown indicating that any one of the combatants resiled from that determination and agreement; and in this fight one of them is killed. Here there was no consent given by the deceased to any particular person killing or wounding him, or as to the particular weapon that might be used for the purpose. Instances of this kind might be multiplied to show that a band of persons varying in number, and armed with different kinds of weapons, may fight another band of persons similarly situate, both bands agreeing to fight each other until one is klled. In these cases, the person killing, the person to be killed, the mode and the instrument by which death might be inflicted, would be uncertain; and yet, each one of the combatants might expressly consent to suffer death, or take the risk of death. Can it be said that in these cases the exception does not apply? In a case where there is no *express* consent, the difficulty of bringing the offence within the exception is indeed great; but there may be facts and circumstances proved, which necessarily lead to an inference of consent, and from which the Jury may find that the deceased took the risk of death with his own consent.

I do not understand that Mr. Justice White in the two cases of *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2)

(1) I. L. R. 6 Calc., 154. (2) Unreported.

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meant to lay down any other proposition of law than two : *first*, that the 5th exception to section 300 of the Indian Penal Code should not be taken to be confined to the case where two men by concert fight each other with deadly weapons ; but that it may also apply in the case of two bands of men entering into a premeditated fight in concert with each other with deadly weapons : and *second*, that the 5th exception stands upon different grounds from the 4th exception. And so far as these two propositions are concerned, I agree with him. I do not think that the said learned Judge meant to lay down, as he could not lay down, any general rule applicable to all cases of the kind ; when in each case, the question must be determined upon evidence whether the deceased took the risk of death with his own consent ; and this must necessarily depend upon the particular facts proved. And as I read his judgments, the conclusion that he arrived at was upon the facts proved in each of the two cases before him.

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[*Reported in B. L. R., Sup. Vol., 443 ; 5 W. R. Cr. 45.*]

The facts of the case are as follows :—

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The evidence proved that the prisoners went with a large body of men, in the middle of the night, to the house of one of the witnesses Fagu ; that they seized Fagu, his brother Foggo, his step-son Kalu, and Amordi, who, with his family, was living in Fagu's compound, and carried them all away to a village called Bungatal, two or three miles distant ; that as they left Fagu's compound, all the houses in it were set on fire and burnt ; that in Bungatal, they took the above four persons to the house of one Boidonath, and tied their hands behind their backs, and severely beat them, so as to break the arms of Fagu, and to make Amordi senseless ; that they then took these four persons to the house of Faridha, Chowkidar of Bungatal, and charged them with theft ; that they carried Amordi on a bamboo with his hands and feet tied together, the result being that he was found, on reaching Faridha's house, to be dead ; and that they satisfied themselves that he was dead, by jumping on the bamboo which was lying across Amordi's body, and finding that he did not cry out. The Civil Surgeon deposed that Amordi had two of his ribs broken and his spleen ruptured, the latter injury being the cause of his death. The Judge of Mymensingh acquitted several persons charged before him with having been concerned in the outrage, but convicted the prisoners.

JACKSON, J.—(after stating the facts as above, continued).—I see no reason to doubt the truth of the evidence against these men. The cause of the attack was, in the Judge's opinion, some suspicion that the prisoners entertained that Fagu and his relatives had been guilty of some theft, but there is nothing to show where or when any theft took place. It appears to me far more probable that the cause was, as the witnesses depose, enmity between the prisoner, Gorachand, and the witness, Fagu, in consequence of the latter having been successful in obtaining the farm of his village against Gorachand, who had also applied for it. But whether there was any suspicion of

*Present :—Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Trevor, Mr. Justice Norman, Mr. Justice Campbell, Mr. Justice E. Jackson and Mr. Justice Glover.

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theft or not, the attack made by these prisoners, the burning of the witnesses' houses, their seizure and severe beating, and the forcible carrying them off for several miles, as well as the manner in which Amordi was carried, resulting in his death, are all clearly proved; and I would, therefore, dismiss the prisoner's appeal.

But there still remains for consideration the question whether this Court ought, looking to the judgment of the Sessions Judge of Mymensingh, and the gross nature of the outrage which has been committed, for which the punishment inflicted appears to me most inadequate, to exercise the powers vested in it under ss. 403 and 405 of the Procedure Code. The prisoners were charged before the Sessions Judge with murder and culpable homicide, but the Judge acquitted them of those offences, and convicted them of a charge which he directed to be added to the calendar, *viz.*,—abetment of culpable homicide. He acquitted them of the charge of murder, because, as he stated, "there is not the smallest reason to suppose that the prisoners with malice prepense killed Amordi." He acquitted them on the charge of "culpable homicide, because none of the witnesses can state which of the prisoners actually struck Amordi and caused his death," but convicted them of abetment of culpable homicide, "because it is proved that some of the prisoners beat Amordi and caused his death, and that the prisoners, who beat Amordi, caused his death by culpable homicide, as he was, doubtless, beaten with the intention of causing such bodily injury as was likely to cause death; and that the prisoners were actually present assisting in taking away Amordi, and assisting by their presence in the beating of him; but it is not clear at whose instigation the crime was committed." The Judge is wrong in law on each separate point. It is not necessary, under the Penal Code, to prove malice prepense to constitute the crime of culpable homicide amounting to murder. The words "malice prepense" do not appear in the Penal Code, and the Judge should, as far as possible, confine himself on his trials to the language of the Code. S. 299 of the Penal Code lays down that whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, commits the offence of culpable homicide. S. 300 lays down that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, except in certain special cases. The Sessions Judge finds the offence which has been committed exactly in the above terms of the law which constitute the offence of murder, and still records that the

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offence committed was only that of culpable homicide not amounting to murder. Here, then, it appears to me that there has been an error in the decision on a point of law, and that, in the express words of the Sessions Judge's judgment, the prisoners should have been convicted of abetting murder, and not culpable homicide. But the Judge is equally wrong in finding the prisoners guilty of abetment. S. 114 of the Penal Code lays down that "whenever a person, who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such an act or offence." The Sessions Judge distinctly finds that the prisoners were present when the offence was committed and still convicts them of abetment.

The Court has authority, under ss. 403 and 405 of the Procedure Code, to consider these points of law, and, where it finds that there has been error in the decision of the Sessions Judge on a point of law, to determine that point of law, and to pass such order as to the Court shall seem right. I would then annul the conviction of the Sessions Judge on the charge of abetment of culpable homicide, and convict the prisoners of the offence of murder; and as it is not clear which of the offenders took the leading part in the crime, and caused the actual death, I would sentence them all to transportation for life.

GLOVER, J.—That the Sessions Judge was altogether wrong in law, there can be no doubt; he has convicted and sentenced the prisoners for abetment of culpable homicide not amounting to murder, whilst his finding, expressed in his own words, shows, as clearly as words can do, that the crime they had committed, and which he himself considered proved, was not culpable homicide not amounting to murder but murder itself. His reasons contradict his judgment. He is equally wrong in convicting of abetment. He finds that the prisoners were all engaged in the assault, and they were, therefore, equally principals. But the question is, whether this Court has power to amend the Sessions Judge's conviction and sentence, and to substitute one that is legal and proper, *proprio motu*. The words of ss. 403 and 405 of the Criminal Procedure Code are, doubtless, very wide, and under them I have no doubt that we have power to amend the lower Court's finding, as being altogether opposed to the evidence and to the Judge's own reasoning, and, therefore, illegal; but we are only, as it seems to me, empowered "to pass such order as may seem right" on the point of law, and I do not see how we could go the length of amending the conviction in the present case, because we

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could not do it without, at the same time, enhancing the punishment from seven years' imprisonment to transportation for life, which would be contrary to the spirit of s. 419.

The proper order, I concieve, would be to annul the Sessions Judge's conviction and sentence as illegal, and direct him to pass a legal order on the evidence and to sentence the prisoners accordingly. For this Court, to pass such an order, would, I think, be contrary to regulations, and contray to the opinion I have already expressed in a somewhat similar case—*Queen* v. *Jan Mahomed* (1)

CAMPBELL, J.—(after stating the facts). The Court has not seen sufficient reason to interfere with the finding of the facts; the appeal of the prisoners is rejected. The only question is as regards the legality of the finding and sentence, which we consider as a Court of Revision. The judgment of the Sessions Judge is full of illegality; and it also appears that the lenient sentence is not only the result of an exercise of a discretion allowed by law to the Sessions Judge, but the direct result of a misapprehension of the law. The Sessions Judge has awarded the *maximum* sentence allowed by law for the offence of which (under his misview of the law) he has convicted the prisoners under s. 115 of the Penal Code, *viz.*, "abetting of the commission of an offence punishable with transportation for life, if that offence be not committed in consequence of the abetment," or as he puts it, "the said offence having been committed not in consequence of that abetment." The "not" might be supposed to be a clerical error, but it seems to be intentional, for the section quoted refers exclusively to the case when the offence is not committed; and in another place the Sessions Judge says:—"As it is not clear at whose instigation the said crime was committed." What he means by saying that the offence was not committed in consequence of the abetment, after his circumstantial statement, that the convicted parties were actively participating in it, or how he convicts of abetment, when the "instigation" is not proved, no one can guess: but setting aside other illegalities and absurdities, one illegality is quite patent in the judgment, which is directly at variance with s. 114. That section most clearly provides that a person, who, if absent, would be liable to be punished as an abettor, if present when the offence is committed, shall be deemed to have committed such offence, that is, he is not an abettor, but a principal. The Sessions Judge finds in so many words that the prisoners were present, therefore the conviction for abetment is illegal.

(1) 1 W. R., Cr. Rul., 49.

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The question then is what can we do? Section 419 of the Criminal Procedure Code, occurring in Chapter XXX—"Appeals,"—and relating to the "Appellate Court," does not affect Chapter XXIX, regarding revisions; it is merely intended to limit the power of an appellate Court, upon the appeal of the party, by the provision that the order passed in appeal shall be "not so as to enhance any punishment that shall have been awarded," thus, then, the appeal of the prisoner is simply dismissed. But the mere fact of an appeal having been preferred does not take away the power of the Court to act as a Court of Revision, and as a Court of Revision, when a sentence is clearly illegal, we can under ss. 403, 404 and 405, revise the sentence, and pass a legal sentence, whether the legal sentence be more severe or less severe than the sentence illegally passed by the District Judge. For instance, if the Court below had in so many words convicted the prisoners of murder, and the Sessions Judge had thereupon sentenced them to seven years' imprisonment, then I think that the said sentence being wholly illegal, this Court might have reversed the sentence, and passed one of the sentences warranted by law, *viz.*, death, or transportation for life. Whether in the case of the Court below specifically finding that the prisoner had committed certain acts in the exact words used by the Penal Code to define one offence, and then choosing to call that act another offence, we could sentence for the right offence, might be more doubtful; probably however, we might. But in the present instance we cannot follow this course for several reasons. *First.*—The Sessions Court is not composed of the Judge alone, but of the Judge and Assessors. The prisoner is entitled to the opinion of the Assessors, and to the influence of that opinion. In this case, the illegality is confined to the judgment of the Judge. There is nothing to show whether the Assessors were or were not misled by the same error of law, or whether they took another view of the facts. Their opinion, after a legal and proper charge, is necessary. *Second.*—It is not exactly the case that the Judge has found the facts necessary to make up the definition of murder. In regard to the difference between culpable homicide and murder, the Code itself is somewhat obscure. There seems to be some repetition and tautology in ss. 299 and 300. We may put the exceptions out of the question for the present. Supposing that the culpable homicide comes within none of the exceptions, is it then necessarily murder? It appears not. By s. 299, whoever causes death by doing an act with the intention of causing death commits culpable homicide. By s. 300 "culpable homicide is murder, if the act is done with the intention of causing death." So far

the definition seems simply to repeat the same provision regarding intention a second time. Then, in the second case, it is culpable homicide, if the act is done "with the intention of causing such bodily injury as is likely to cause death"; but in the second case of murder, in adding nearly the same proviso to culpable homicide, there is a slight variation in the words, the culpable homicide must be done, "with the intention of causing such bodily injury as the offender knows to be likely to cause death"; the words "offender knows" are added. It would seem that if a man scalps another, knowing that he will thereby probably or very likely cause death, he is guilty of murder; but if he is a savage, who intends to scalp, but has no distinct knowledge that death will probably ensue, and death does ensue as a likely consequence, he is guilty of culpable homicide not amounting to murder. In the latter case, also if the injuries inflicted are so severe as not only to be likely to cause death, but almost of necessity to cause death in the ordinary course of nature, then again the case comes within the third class of murder, even without the knowledge. The difference seems to be when, in addition to want of knowledge of the probable ulterior results, the injuries intended to be inflicted are such as are likely to cause death, but not such as in the ordinary course of nature must necessarily cause death. Thus the difference is, in fact, not very broad, that is in the absence of the exceptions. Still it must be supposed that the law intended to make some difference, and the words used by the Judge, "he was doubtless beaten with the intention of causing such bodily injury as was likely to cause death" by omitting the words "the offender knew to be" tally more exactly with the definition of culpable homicide than with that of murder. If the facts of this case be so, and the prisoners did not know that death would be the probable or likely result, they would have the benefit of that difference or doubt, subject to the additional question,—were the injuries intended to be inflicted such that, in the ordinary course of nature, they must almost necessarily have caused death to a man in ordinary health? *Third.*—The finding of the facts by the Judge being so contradictory and unintelligible, it would be most unsafe to assume that he has found any thing distinctly.

The judgment and sentence, being contrary to law, must be reversed. The Judge having left, we cannot order him to charge the Assessors again, record a legal judgment, and pass a legal sentence; and, therefore, annulling the proceedings, we must order a new trial. The Judge will, on the trial, consider, 1st.—Did the prisoners, either by their own hands or by such conduct, when present, as would have

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amounted to abetment if absent, intentionally inflict or cause to be inflicted such bodily injury as was likely to cause death? 2nd.—If so, had they the knowledge that they were likely to cause death? 3rd.—If they had not the knowledge, were the injuries intended to be inflicted so severe as, in the ordinary course of nature, must cause death to a healthy man? If the first question is answered in the affirmative, the prisoners will be guilty of culpable homicide. If, further, either the second or third question be answered in the affirmative, the offence will be murder.

If, both the second and third questions are answered in the negative, then the offence will be culpable homicide not amounting to murder.

GLOVER, J.—As Mr. Dodson, the Sessions Judge, who tried the case, has left Mymensingh, I concur with Campbell, J., in quashing the conviction and ordering a new trial.

[Before issuing final orders, it was thought desirable by Campbell and Glover JJ., to take the opinion of the Full Bench on the points of law involved. The case was accordingly referred to a Full Bench.] The opinion of the Full Bench was delivered by

PEACOCK, C. J.—There are, in my opinion, several important distinctions between murder and culpable homicide; an offence cannot amount to murder, unless it falls within the definition of culpable homicide, for s. 300 merely points out the cases in which "culpable homicide is murder." But an offence may amount to culpable homicide without amounting to murder. Culpable homicide is not murder, if the case falls within any of the exceptions mentioned in s. 300. The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in s. 300. Causing death with the intention of causing bodily injury to any person if the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, in my opinion, falls within the words of s. 299—"with the intention of causing such bodily injury as is likely to cause death," and is culpable homicide. It is also murder, unless the case falls within one of the exceptions; see s. 300, cl. 3. Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in s. 300, unless it falls within cls. 2, 3 or 4 of s. 300; that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is

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caused, or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death. In speaking of acts, I, of course, include illegal omissions There are many cases falling within the words of s. 299,—"or with the knowledge that he is likely by such act to cause death" that do not fall within the 2nd, 3rd or 4th clauses of s. 300, such for instance, as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must, in all probability, cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in cl. 2 or 3 of s. 300.

As an illustration; suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one, or to cause bodily injury to any one. In such a case, if he should cause death, I apprehend, he would be guilty of culpable homicide not amounting to murder, unless it should be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c., as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for life, or imprisonment for ten years, with fine (see ss. 304 and 59); or if a European or American, he would be subject to penal servitude, instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder, if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c., as in cl. 4, s. 300. From the fact of a man's

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doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his acts would be likely to cause death. Presumption of intention must depend upon the facts of each particular case. Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus, that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving, it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death. Would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the Judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing death was such that he must have known, and did know, that his act must, in all probability, cause death, &c., within the meaning of cl. 4, s. 300. If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment.

It appears to me the rules contained in ss. 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the Court, as a Court of Revision, thinks it right to take up. An appeal is matter of right in all cases in which an appeal is given; but a revision is in the discretion of the Court. An appeal is for matter of fact as well as for matter of law. A revision is only on matter of law. The two cases, therefore, are very different. When s. 407 says that an appeal shall not lie for a judgment of acquittal, it means that the prosecutor shall not, as a matter of right, be entitled to apply to reverse the judgment of acquittal, either upon the facts or upon the law. But s. 404 authorizes the Court to call for and examine the record of any criminal trial in which it shall appear that there has been error in the decision upon a point of law and may determine any point of law arising out of the case, and thereupon pass such order as to the Court may seem right. S. 405 enacts that

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"it shall be lawful for the Sudder Court to call for and examine the record of any case tried by a Court of Session, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of the Court. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." The word "sentence" in the latter section may mean the award of punishment merely, or the whole judgment including the finding. If it refers only to the award of punishment, the finding would stand; and I can scarcely see the necessity or use of the words "or may order a new trial." The words, "sentence or order," are in many sections used as including the finding, and not merely the awards of punishments—ss. 415, 416, 417, 420. But, whatever may be the construction of the word "sentence," in s. 405, there can be no doubt that, under s. 404, the Court may set aside a judgment of acquittal for error in point of law. Suppose the decision of a Judge should be monstrously absurd; suppose, upon an indictment for murdering a a child, the Judge and the Assessor should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in s. 300 of the Penal Code; but suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should therefore acquit the prisoner and order him to be discharged,—could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and send the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged), and to pass the proper sentence upon him. If, in the case above supposed, the Judge were to say, it is not necessary to try whether death was caused by an act done with the intention of causing death, because if it was so caused the prisoner was not guilty of murder: I find that the child was under the age of six months, and, therefore, acquit the prisoner—in such a case, there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal, and order

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a new trial. I have supposed an error in law, which is not likely to occur. I put it merely as an illustration ; there are many constructions of law equally erroneous, though not so clearly so. Again, suppose, a Magistrate, in a case triable by him, should convict of an offence, and the Sessions Judge, on appeal, should, without going into the facts, reverse the decision upon a point of law, and order the prisoners to be discharged, stating that, assuming the facts to be as found by the Magistrate, the prisoner was not guilty of an offence, this Court, if the Judge were wrong in point of law, could, as a Court of Revision, reverse his decision, and direct him to try the appeal upon its merits. If a Judge, on appeal, should uphold the finding of a Magistrate on the facts, and reverse his decision in point of law, and pronounce a judgment of acquittal, and order the prisoner to be discharged, then, as the acquittal would be merely on a point of law, this Court, as a Court of Revision, might reverse the judgment of acquittal, and order the sentence of the Magistrate to stand.

There are also cases in which, notwithstanding section 419(1), the Court as a Court of Revision, could enhance a punishment.

In the case of *The King* v. *Bourne* (2), it was held that a sentence of transportation for an offence, for which the only punishment was death, was erroneous and must be reversed. The Court held that they could merely reverse the erroneous sentence, but could not pass the right one, and the prisoners were discharged. The law was amended by 11 and 12 Vic., c. 78, by which the Court, upon reversing an erroneous sentence, may give the proper judgment. Here, under s. 405 of the Criminal Procedure Code, the Court, as a Court of Revision, has a similar power ; but in order to do so, it may be necessary to enhance the punishment. In the case suggested by Campbell, J., if a Sessions Judge should pass sentence of rigorous imprisonment for 14 years for murder, such a sentence would be bad ; for it is not authorized by law—s. 302 of the Penal Code ; or if he should pass sentence of transportation for seven years for the offence of murder, committed by a person under sentence of transportation for life, the sentence would be contrary to law ; *See* section 303, by which death is the only punishment which can be awarded. In such cases the Court, as a Court of Revision, could, under s. 405, reverse the sentence, and pass the proper sentence,

(1) Act XXV of 1861, s. 419.—"The Appellate Court, after perusing the proceedings of the lower Court, and after hearing the plaintiff or his counsel or agent, if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded."

(2) 7 A. & E., 58.

notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence, in the former case from four years' rigorous imprisonment to death or transportation for life, and in the latter from transportation for seven years to sentence of death. S. 405 says, if the Court shall be of opinion that the sentence or order is contrary to law, it "shall reverse the sentence or order, and pass such judgment, sentence or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." In the case supposed, in which a prisoner under sentence of transportation for life should be found guilty of murder and sentenced to transportation for seven years, the Court might think the finding right, upon the evidence, and there would, therefore, be no necessity for ordering a new trial. In such a case a question might arise, whether the Court would be bound to pass the only legal sentence, *viz.*, death, or might send the case back to the Sessions Judge to pass the sentence. I am of opinion that the Court might send the case back with an order to pass the proper sentence, under the words "shall pass such judgment, sentence or order," &c. In the case supposed of a prisoner being sentenced to fourteen years' rigorous imprisonment for murder, upon setting aside the erroneous sentence, the right sentence would be a discretionary one, *viz.*, "death or transportation for life." In such a case, I think the Court ought to send the case back for proper sentence to be passed, in the same manner as it would do under s. 402.

By the statute 11 and 12 Vict., c. 78, s. 5, the Court, when it reverses a judgment, may either pass a proper judgment, or remit the case to the lower Court, in order that such Court may pass the proper judgment. It appears to me that in all cases in which the Court, as a Court of Revision, thinks it right to reverse an acquittal on a point of law, or to reverse, as erroneous, a sentence, in order that the right sentence may be passed, if the right sentence would enhance the one already passed, the offender should have an opportunity of being heard by himself or his pleader or agent, either before the lower Court, if the case is remitted to it, or before the High Court, if the Judges pass the proper sentence themselves.

The Court may act as a Court of Revision after it has acted as a Court of Appeal, if it find it necessary to do so, in order to correct an error in law which cannot be set right on appeal. For instance, if a man should be found guilty of a murder, and sentenced to seven years' transportation, if the prisoner should appeal on the facts, the Court might uphold the finding of guilty of murder on

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appeal, and afterwards, as a Court of Revision, might set aside the sentence of seven years' transportation, and pass a legal sentence, for murder, or send it back to the lower Court to pass such sentence, pointing out, as they would in a case under s. 402, what is the proper punishment. As a Court of Revision the Court cannot reverse the finding of a jury.

In the present case, the attention of the Judge should, I think, be called to another error which he committed. He says, the prisoners were present, assisting in taking away Amordi and assisting by their presence in the beating of him, abetted the commission of culpable homicide, &c.

It does not follow that, because they were present with the intention of taking him away, that they assisted by their presence in the beating of him to such an extent as to cause death. If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was, all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.

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NOTE.

Section 439 of the present Code of Criminal Procedure (Act V of 1898), defines the powers of the High Court on revision. The sections enumerated in sec. 439 give the High Court on revision all the powers which can be exercised by a Court of appeal. There is, however, some distinction. As a Court of Revision, the High Court can enhance a sentence; as a Court of appeal it cannot. As a Court of Revision, in respect of an order of acquittal, the High Court cannot convert a finding of acquittal into one of conviction; as a Court of appeal, in an appeal against an order of acquittal, the High Court can find the accused guilty and pass sentence on him according to law. In such a case, the High Court, as a Court of Revision, can only reverse the order of acquittal, and direct that further enquiry be made or that the accused be re-tried or committed for trial. It cannot convert a finding of acquittal into one of conviction [Cl. 4 of Sec. 439.]

As a Court of appeal, the High Court can consider an order of acquittal only on the appeal of the Local Government, Sec. 417 (Act V of 1898). But as a Court of Revision, it has wider powers.

Until the Code of 1882, Sec. 439 of which is in this respect the same as Sec. 439 of the Code of 1898, power was not given to the High Court, on revision, to consider on its merits a case in which a final order of conviction or acquittal had been passed, unless an error in law was found.

Sec. 537 of the present Code, however, has a most important bearing on the exercise of powers of revision.

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v.

UDOY SANT.*

[*Reported in I. L. R., 22 Calc., 669.*]

1895.
April, 30.

The judgment of the Court (PETHERAM, C. J., and BEVERLEY, J.) was as follows :—

On the 19th January last, the petitioner, Prosonno Kumar Patra, was convicted of an offence under section 380 of the Penal Code, and was sentenced to six months' rigorous imprisonment. On appeal, the Sessions Judge of Midnapore upheld the conviction, but reduced the sentence to rigorous imprisonment for one day and a fine of Rs. 50. On the 21st ultimo, the petitioner obtained a rule from this Court to show cause why the conviction should not be set aside, on the ground that no offence under section 380 of the Penal Code had been committed.

The case for the prosecution was that, on the 13th December last, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the immediate order of the petitioner, with a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the petitioner as rent. The defence was that the cattle were handed over to the petitioner's servants voluntarily in part payment of a debt due by him, and that the petitioner himself was not present at the time, and knew nothing of the occurrence. This defence has been found false by the lower Courts, and the question before us is whether, upon the case for the prosecution, the offence of theft has been committed.

The history of the Indian legislation which deals with theft and other offences against property, is interesting and instructive. In the Penal Code, as drafted in 1837, the section which defined theft was section 363, and was in these words :—"Whoever intending to take fraudulently anything which is property, and which is not attached to the earth, out of the possession of any person, without that person's consent, moves that thing in order to such taking, is said to commit theft." The section was followed by several explanations, the last of which was : "A person may commit theft, though he intends to restore the property after taking it," and by a number of illustrations, among which were the following :—

(*o*) *A* takes an article belonging to *Z* out of *Z*'s possession, without *Z*'s consent, with the intention of carrying it back to *Z* and

of pretending to have found it, in the hope of thus obtaining a reward from *Z*. Here *A* takes fraudulently. *A* has therefore committed theft.

(*q*). *A* and *Z* are gardeners. *Z* has reared a pine-apple of extraordinary size in hope of obtaining a prize. *A* takes the pine-apple without *Z*'s consent, produces it before the Judges as his own, and obtains the prize. He then sends back the pine-apple to *Z*. Here, as *A* took the pine-apple fraudulently, *A* has committed theft, though he has restored the pine-apple.

(*t*) *A*, being on friendly terms with *Z*, goes to *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent. Here it is probable that *A* may have conceived, that he had *Z*'s implied consent to use *Z*'s books. If this was *A*'s impression, *A* has not committed theft.

(*y*) *A*, believing in good faith that *Z* owes him a thousand rupees, and only intending to pay himself what is due to him, without injury to any party, takes property out of *Z*'s possession without *Z*'s consent. *A*, not acting fraudulently, is not guilty of theft. But he may have committed an offence under the provisions contained in the chapter entitled "of the illegal pursuit of legal rights."

(*z*) But if *A*, in the last illustration, intended to take and appropriate more than sufficient to repay himself, or intended, after repaying himself, to prosecute *Z* for the debt, here, as such an intention was fraudulent, *A* commits theft.

The offence of the illegal pursuit of legal rights, which was contemplated by the framers of the Draft Code, was defined by section 460 of the Draft Code as follows: "Whoever in good faith, believing a debt to be legally due, takes, or attempts to take, any property from the person whom he believes to owe that debt, not fraudulently, but in order to satisfy that debt, under such circumstances that, if his intentions were fraudulent, he would be guilty of theft or robbery, shall be punished with imprisonment of either description for a term which may extend to one year or fine or both."

Added to the section were several illustrations, of which the first was (*a*): "*A*, believing in good faith, that *Z* owes him one hundred rupees, in order to satisfy the debt, takes property belonging to *Z*, not fraudulently, but under such circumstances that, if he took it fraudulently, he would be guilty of theft. *A* sells that property for one hundred and fifty rupees, and sends back fifty rupees to *Z*, *A* has committed the offence defined in this clause."

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In the appendix to the Draft Code, the framers in note (*o*) say in speaking of this offence: "This act is distinguished from theft by one of the broadest lines of demarcation which can be found in the Code. It is not a fraudulent act. It is intended to correct a wrongful distribution of property, to do what the Courts of law, if recourse were had to them, would order to be done. Public feeling would be shocked if such a creditor were called by the ignominious name of a thief."

It does not appear that at this time the framers of the Code intended to make the taking possession of the property of a debtor by his creditor in order to pay a just debt any offence at all, inasmuch as such an act is excluded from the operation of section 363 by illustation (*y*), and from that of section 460 by the terms of the section itself and by those of illustration (*a*), both of which provide that the taking must be to satisfy the debt in order to be an offence within that section.

On the 23rd of July, 1846, the Indian Law Commissioners presented their first report on the Penal Code, and in paragraghs 486 and 487 deal with the offence of theft as defined in section 363 of the Draft Code. In paragraph 486 they say: "The Code differs from the Digest in the explanation that a person may commit theft though he intends to restore the property after taking it, whereas by article 30, section 1, Chapter XVIII of the Digest, it is declared that it is not theft where the intent is to deprive the owner of the temporary possession only, and not of his absolute property, in the thing taken. Thus the intent expressed in the definition given in the Digest is to despoil the owner and fraudulently appropriate the thing taken and removed, while the intent expressed in the definition in the Code is merely to take fraudulently, that is to say, to take with the purpose of causing wrongful gain to the party taking, or some other, by means of wrongful loss to the party from whom the thing is taken, or by depriving him of the benefit which he would have enjoyed if it had not been taken from him." In paragraph 487 the Commissioners go on to discuss illustration (*q*) to the section, and come to the conclusion that it is necessary and sufficient for the purpose for which it was framed, but they add that there is a difference of opinion between them as to whether the principle of the Digest, or that of the Draft Code, is the one on which the Legislature ought to act.

In the second report of the Commissioners, which was dated June 24th, 1847, they discuss, in paragraphs 308 to 317, the provisions in the Draft Code, which create the offence which is

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described as the illegal pursuit of legal rights, and intimate that they approve of them.

The Indian Penal Code became law in 1860. In that Code, section 378 takes the place of section 363 in the Draft Code, and the only practical difference between the two sections themselves is that the word "dishonestly" is substituted for the word "fraudulently"; but the definitions in sections 23 and 24 of the Penal Code attach precisely the same meaning to the word "dishonestly" as was attached to the word "fraudulently" by sections 15 and 16 of the Draft Code. Several of the explanations attached to the section in the Draft Code are changed, and the one which we have quoted above is entirely omitted, as are also illustrations (*g*), (*y*) and (*z*). The whole of the provisions which related to the illegal pursuit of legal rights have disappeared; but to section 403, which deals with the offence of criminal misappropriation of property, the following explanation is appended: "A dishonest misappropriation, for a time only, is a misappropriation within the meaning of this section," and several illustrations are given, among which is (*b*): "*A*, being on friendly terms with *Z*, goes to *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent. Here, if *A* was under the impression that he had *Z*'s implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section."

As we have before noticed, the section itself is practically the same now as it was when it stood in the Draft Code, as although one word has been substituted for another, the two words have the same meaning attached to them by the definitions, and the question we have to consider is whether it is clear from the words used by the Legislature that it was their intention that the offence of theft should be committed when property is taken out of the possession of the owner, without his consent, with the intention of returning it to him and without the intention of gaining anything by the temporary detention, except something to which the taker is legally entitled, notwithstanding the fact that the explanation and illustration, which had been inserted in the Draft Code for the express purpose of making it theft to deprive a person temporarily of the use and enjoyment of his property, were deliberately omitted when it was passed into law.

The only one of the illustrations to the present section, which throws, we think, any light on this question, is (*l*): "*A* takes an article belonging to *Z* out of *Z*'s possession without *Z*'s consent, with

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the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly. *A* has therefore committed theft."

A consideration of this illustration shows that the person who is represented as taking the thing, takes it with the intention of appropriating it to his own use, and not merely of using it for a temporary purpose, in the same sense that a person who buys an article for the purpose of selling it again immediately, buys it in order to appropriate it to his own use, though he only intends to keep it for a very short time. In the case in the illustration, the taker takes the thing with the intention of keeping it until he can exchange it for money, or something else, to which he is not entitled, and this appears to us to be stealing the thing taken in the most ordinary sense of the word. So that, as far as the illustrations to the existing sections help us, they indicate that it was the intention of the Legislature that in order to have committed theft, within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him, in order to regain his property.

The words in the present section "whoever, intending to take dishonestly any moveable property out of the possession of another, moves that property, &c.," must be read with the definitions in sections 23 and 24, and the section will then read, "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, &c.," and the question comes to be, whether to gain property by unlawful means, means to gain the thing moved for the use of the gainer, or whether it means the gaining possession of it for a time for a temporary purpose. We think that the first is the more natural meaning of the words, and that, even without the history of this section, that is the meaning which we should put upon them; but when we know that it is that which the framers intended them to bear, and that the Legislature refused to sanction the explanation and illustration which would have given them a wider meaning, we think the matter becomes abundantly clear.

We now proceed to examine the decisions of the various Courts in India on the subject. They are :—

1. *Queen* v. *Madaree Chowkeedar* (1), decided by Peacock, C. J., with Kemp and Glover, JJ., on the 17th of February, 1865. The learned Judges held that the prisoner who had taken the goods of a

(1) 3 W. R., Cr., 2.

debtor and divided them amongst his creditors, forcibly and against his will, was guilty of theft.

2. *Queen* v. *Preonath Banerjee* (1), decided by L. S. Jackson, J., on the 16th of April, 1866. The learned Judge held that the forcible and illegal seizure by a creditor of his debtor's bullock in order to satisfy his claim was theft.

3. *Jowahir Shah* v. *Gridharee Chowdhry* (2), decided by E. Jackson, and Hobhouse, JJ., on the 9th of September, 1868. The learned Judges held that where the accused prevented the complainants from proceeding in a certain direction with their carts, and exacted a sum of money from them, a toll which they had no right to claim, they were guilty of wrongful restraint, but not of theft.

4. *Queen* v. *Tarinee Prosad Banerjee* (3), decided by Kemp and Glover, JJ., on the 4th of June, 1872. The learned Judges held that the carrying off of certain buffaloes belonging to the complainant by order of the accused, and the detention of them in the custody of his servant, amounted to an abetment of theft as defined in the Penal Code. The facts of this case do not appear at all clearly from the report, but as the learned Judges say it was very similar to that of *Queen* v. *Madaree* (4) *(supra)* we assume that there was evidence that the accused intended to deprive the complainant entirely of his buffaloes, or to detain them until he got something to which he was not entitled in exchange for them.

5. *Aradhun Mundul* v. *Myan Khan Takadgeer* (5), decided by Glover and Mitter, JJ., on the 4th of June, 1875. The learned Judges held that the illegal seizure and impounding of cattle is not theft within the meaning of the Penal Code, even if effected with the malicious intent of subjecting the owners to additional expense, inconvenience and annoyance. In this case, it does not appear that the accused intended themselves to make any profit from their own illegal act.

6. *Queen* v. *Soshee Bhushun Roy* (6), decided by Kemp and Glover, JJ., in 1876. The learned Judges held that where a person improperly obtained possession of a *khatta* book, and retained it with the intention of using it in a judicial enquiry as evidence against the person to whom it belonged, he had not committed theft, as such temporary retention could not cause wrongful loss to the owner within the meaning of the Code.

(1) 5 W. R., Cr., 68.
(2) 10 W. R., Cr., 35.
(3) 18 W. R., Cr., 8.
(4) 3 W. R., Cr., 2.
(5) 24 W. R., Cr., 7.
(6) 4 Shome's Rep., 14.

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7. A Madras case, reported in Weir's Law of Offences and Criminal Procedure, p. 232 (3rd edition), decided on the 20th of February, 1880, by the Chief Justice and Innes, J. The facts were that the accused, creditor of the prosecutor, drove away sundry head of cattle, during his absence, in order to put pressure upon him and get his debt paid. The learned Judges held that such taking caused wrongful loss to the prosecutor, was dishonest and therefore theft, and that it made no difference that the taking was intended to be only for a time.

8. *Queen-Empress* v. *Nagappa* (1), decided on the 27th of January, 1890, by Birdwood and Jardine, JJ. The learned Judges held that the accused who had seized a boat which belonged to the complainant, while conveying passengers across a creek which flowed into a river at a point within three miles from a public ferry, his intention being to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and so to increase the income of the ferry, had committed theft, though it was not his intention to convert the boat to his own use, or to deprive the complainant permanently of its possession.

9. *Paryag Rai* v. *Arju Mian* (2), decided by the Chief Justice and Beverley, J., on the 18th of August, 1894. The accused were found to have loosened the complaintant's cattle at night and driven them to the pound, with the object of sharing with the pound-keeper the fees to be paid for their release. The learned Judges held that in that case the elements of theft were present, and directed that the accused should be tried for that offence.

This examination of the decisions shows that the learned Judges of the Madras High Court in 1880 thought that the section of the present Code had a more extended meaning than that in the Code as originally drafted, even with the explanation which was omitted when the Code became law, and a more extended meaning than the section in the Draft Code which dealt with the illegal pursuit of legal rights, inasmuch as that section was limited to cases in which the property was illegally taken in satisfaction of a claim, and the Madras Court has held that it is theft for a creditor to deprive his debtor of the temporary possession of some article of his property, in order to put pressure on him to force him to pay a just debt. It also shows that in 1890 the learned Judges of the Bombay High Court thought that the present section has the same meaning as that given to the section in the Draft Code by the explanation which was omitted when the Code became law, as they held that it was theft to deprive a person of the possession of his property for a limited time, although there

(1) I. L. R., 15 Bom., 344. (2) I. L. R., 22 Calc., 139.

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was no intention on the part of the accused to appropriate the property to his own use in any way. The earlier decisions in this Court are not fully reported, and it is difficult in some cases to ascertain from the reports what the precise facts of the cases were, but from the most careful examination of those cases which we can give them, we do not think that the learned Judges of this Court have ever intended to give the section of the present Code a wider meaning than that given it by illustration (*l*) which we have quoted above, the effect of which is that it is theft if a person takes the property of another for the purpose of extorting from the owner, in exchange for the thing taken, some thing which the taker has no right to claim. We are of opinion that the Courts of Madras and Bombay have given to the section a more extended meaning than it was intended by the Legislature to bear, and that the history of the law shows that what we understand to have been the reading of the section by the Judges of this Court has been the correct one. For these reasons we think that upon the case for the prosecution the offence of theft has not been committed, and the rule will be made absolute to set aside the conviction. The fine, if it has been paid, will be refunded.

Rule made absolute. Conviction set aside.

NOTE.

This case was subsequently over-ruled by a Full Bench in the case of *Queen-Empress* v. *Sri Churn Chungo*, I.L.R., 22 Calc., 1017.

QUEEN-EMPRESS
v.
SRI CHURN CHUNGO.

[*Reported in I. L. R., 22 Calc., 1017.*]

The facts of the case are as follows :—

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December, 20.

The sister of the complainant, Kunjo Pramanick, was married to a man named Krishna Pramanick. Her husband borrowed a sum of Rs. 5 from Babu Huri Nath Bagchi, and this debt with the interest on it increased to Rs. 11-8. Krishna Pramanick executed a bond for this amount. About a year ago he died leaving a widow and child. He left also a buffalo and bullock. His widow after his death went to live with her brother, Kunjo Pramanick, and took the buffalo and bullock with her. Kunjo Pramanick used to work for other people as a ploughman using his sister's buffalo and bullock in the plough. On the day in question he had gone to Jamsherpur to plough the land of one Mokunda. He was to be paid for the work. While he was preparing the land the servants of Babu Huri Nath Bagchi came and forcibly took the buffalo and bullock to Huri Babu's *cutchery*. Huri Babu detained the bullock and said he would not release it until the debt due from Kunjo's deceased brother-in-law was paid.

The following judgments were delivered by the Full Bench **(Petheram, C. J., Prinsep, J., Pigot, J., Macpherson, J., and Banerjee, J.)**

Petheram, C. J.—I am of opinion that the accused was rightly convicted, and that there is no reason for the interference of the Court in this case.

A comparison of the judgment in the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) with the whole of the definitions contained in section 23 of the Penal Code, will shew that no effect has been given in that judgment to the last two paragraphs of the section.

The judgment proceeds on the assumption that when the words in the definition are read with section 378 of the Penal Code in place of the word "dishonestly," the section will read "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, is said to commit theft." It is evident that in making such an assumption the last two paragraphs of section 23 have been left out of consideration, and if they as well as the first paragraph are read with section 378 it will read as follows: "Whoever in order to take with the

(1). I. L. R., 22 Calc., 669.

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intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft." When the section is read in this way it is evident that it was the intention of the Legislature that it should be theft under the Code to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code. For these reasons I think the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) was wrongly decided.

Pigot, J. (Prinsep and Macpherson, JJ., concurring).—We agree in the opinion that the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) was wrongly decided. We think that upon the facts of that case the accused had been rightly convicted of theft.

We think that it is not necessary to constitute the offence of theft that there should be shown on the part of the accused an intention [to use the words in I. L. R., 22 Calc., at p. 676] "to gain the thing moved for the use of the gainer"; but that it is enough to show an intention to gain possession of it for a time for a temporary purpose. We think the proposition stated in Mayne's Penal Code (14th Ed.) at page 340 is correct. It is as follows: "It is sufficient to show an intention to take dishonestly the property out of any person's possession without his consent, and that it was moved for that purpose. If the dishonest intention, the absence of consent, and the moving are established, the offence will be complete, however temporary may have been the proposed retention."

We think that this proposition is in accordance with the definition of theft in section 378 of the Code; and that it was laid down in the cases of *Queen* v. *Madaree* (2), *Queen* v. *Preo Nath Banerjee* (3), and *In the matter of the Petition of Tarinee Prosaud Banerjee* (4),

(1). I. L. R., 22 Calc., 669.
(2) 3 W. R., Cr., 2.
(3) 5 W. R., Cr., 68.
(4) 18 W. R., Cr., 8.

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and in the case reported in Weir, page 233 (3rd Ed.) cited in the case of *Prosonno Kumar Patra* v. *Udoy Sant* and also in the cases in Weir (3rd Ed.) at pp. 235, 244 and 245. We think that the decisions of this Court above referred to are not intended tc be limited to cases coming within illustration (*l*) of section 378 but were intended to affirm and did affirm and lay down the wider construction of the section stated in the passages from Mayne above cited which, as we have said, we hold to be correct.

We do not propose to consider the history of the Penal Code from its original draft by Lord Macaulay in 1840 to its becoming law in 1860. Their Lordships of the Privy Council, in the recent case of *The Administrator-General of Bengal* v. *Prem Lall Mullick* (1) have held that it is not competent to refer to proceedings of the Legislature as legitimate aids to the construction of a law.

We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of section 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things in which every man might, if strong enough, take the law into his own hands.

It is necessary, we think, to point this out; and perhaps the more necessary, having regard to the views expressed by the Officiating Sessions Judge in the letter in which, under the provisions of section 438, he submits this case to the Court.

Mr. Justice Prinsep and Mr. Justice Macpherson agree in this judgment.

Banerjee, J.—The questi n that arises for determination in this case is, whether a creditor, by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt, commits the offence of theft as defined in section 378 of the Indian Penal Code.

To constitute theft as defined in the section referred to—

(1) There must be an intention to take some moveable property,

(2) The taking intended must be dishonest,

(3) It must be from the possession of another person without his consent, and

(1) I. L. R., 22 Calc., 788; L. R., 22 I. A., 107.

(4) There must be a moving of the property in order to such taking.

Now, if there was an intention to take here within the meaning of the section, the third and fourth requirements are evidently satisfied; for the buffalo and the bullock were taken from the possession of the debtor without his consent and were carried away. The points for consideration, therefore, are, first, whether there was any intention to take within the meaning of the section, and, second, whether the taking intended was dishonest.

That there was a taking of the animals is not denied; but it may be said that the taking contemplated by the section is a permanent taking and not a mere temporary taking, such as there has been in this case, in order to force the debtor to pay his debt. I do not think that such a view is correct. Illustration (*l*) of the section clearly shews that taking a thing with the intention of keeping it only for a time is taking within the meaning of the section.

It remains now to consider whether the taking in this case was a dishonest taking according to the definition of "dishonestly" in section 24, that is to say, whether the taking was "with the intention of causing wrongful gain to one person or wrongful loss to another." I think the question must be answered in the affirmative, as the creditor in taking and detaining the animals intended to cause both wrongful gain to himself and wrongful loss to the debtor within the meaning of section 23; for he retained, by unlawful means, property to which he was not legally entitled, and he unlawfully kept his debtor, who was legally entitled to the property, out of possession and enjoyment of the same. "Wrongful gain" according to the definition in section 23 is constituted not only by wrongful acquisition of property (which is in accordance with the ordinary meaning of the words) but also by wrongful retention of the same, even though such retention does not result in any profit to the person retaining it: so "wrongful loss" is constituted not only by wrongful deprivation of property, but also by the being wrongfully kept out of the same.

And a thing is said to be done "dishonestly" according to the definition in section 24, not only when it is done with the intention of causing wrongful gain to one person in the first mentioned sense of the words "wrongful gain" (and this is in accordance with the ordinary popular signification of the term), but also when it is done with the intention of causing wrongful gain in the other sense, or done only with the intention of causing wrongful loss to some one, though

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such loss to one person may not be accompanied by any wrongful gain to another.

It is this comprehensive nature of the definition of "dishonesty" in the Indian Penal Code which brings within the definition of "theft" cases which may not come under the ordinary popular signification of the term, and which has led to the use of such expressions as "technical theft."

By graduating the scale of punishment for theft from rigorous imprisonment for three years *and* fine limited only by the power of the Court holding the trial to a nominal fine, the Penal Code has no doubt provided a safeguard against its comprehensive definition of theft leading to any hardship. But there is one anomaly which the Criminal Law on this point has not been able to avoid. The offence of theft is made a non-bailable offence (see Schedule II of the Code of Criminal Procedure); so that, though a person accused of theft may after conviction be let off with a fine only, if his offence be a light one, yet before conviction and pending trial he must, unless the case comes under section 497 of the Criminal Procedure Code, or unless a superior Court interferes under section 498, remain in custody.

In making the foregoing observations, I must guard myself against being supposed to under-estimate the gravity of an offence like the one which has been committed in this case.

The view I take, namely, that the act of the accused in this case comes within the definition of theft in section 378 of the Indian Penal Code, is in accordance with the general consensus of opinion in this Court and in the High Courts of Bombay and Madras. I need only refer to *Queen* v. *Madaree*(1), *Queen* v. *Preo Nath Banerjee* (2), *In the matter of the Petition of Tarinee Prosaud Banerjee* (3), *Queen-Empress* v. *Nagappa*(4) and the Madras case reported in Weir's Law of Offences and Criminal Procedure, 3rd edition, p. 233. Against these authorities there is the case of *Prosonno Kumar Patra* v. *Udoy Sant* (5) which no doubt takes the opposite view. Being the latest case on the point and the one that has led to this Full Bench Reference, it requires examination.

The grounds of the decision in *Prosonno Kumar Patra* v. *Udoy Sant* (5) are, shortly stated, these three:—

(1) The taking contemplated by section 378 of the Indian

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(1) 3 W. R., Cr., 2.
(2) 5 W. R., Cr., 68.
(3) 18 W. R., Cr., 8.
(4) I. L. R., 15 Bom., 344.
(5) I. L. R., 22 Calc., 669.

Penal Code is either a permanent taking or a temporary taking with intent to appropriate the thing taken to the taker's use.

(2) The definition of "dishonestly" read with section 378 shows that the wrongful gain of the thing moved must mean gain of the thing "for the use of the gainer" and not mere "gaining possession of it for a temporary purpose."

(3) The omission from the Code as enacted of certain provisions which were inserted in the Draft Code supports the view embodied in the first ground.

I have already shown that the first mentioned ground is not sound, as it is opposed to illustration (*l*) of section 378.

The second ground deals with only one part of the definition of "dishonestly," namely, that which speaks of wrongful gain in one of the two senses in which that expression is used, and it takes no notice of the other part which refers to wrongful loss, nor of the other meaning of wrongful gain. But as I have shown above dishonesty is constituted by either of these two elements in either of the two senses being present; and there can be no doubt that both wrongful gain and wrongful loss were intended to be caused in this case.

As to the third ground, it is enough to say that if the definition in the Code as enacted clearly includes, as I think it does, a case like the present, the omission from it of certain provisions that found a place in the Draft Code can warrant no safe inference to the contrary.

For all these reasons I agree generally in the opinion expressed by Mr. Justice Pigot. I must respectfully dissent from the decision in *Prosonno Kumar Patra* v. *Udoy Sant*(1), and answer the question referred to us in the affirmative.

That being my opinion, I must hold that the accused in this case has been rightly convicted of theft: and there being no reason to think that the punishment is too severe, I would affirm both the conviction and the sentence.

(1) I. L. R., 22 Calc., 669.

NOTE.

This case overrules the decision in *Prosonno Kumar* v. *Udoy Sant*, I. L. R., 22 Calc. 669. See *ante*. But that judgment is worthy of careful study as containing the history of the law on the subject. See also the cases of *R.* v. *Aga Muhummad*, I. L. R. 18 All. 88 and *Nabi Buksh* v. *Queen-Empress*, I. L. R. 25 Calc. 416. See *post*. The leading case brings out two points, namely *first*, that a claim of right set up in defence to a charge of theft in order to be valid must be a claim of right to possession and a claim to some rights in the thing taken is not a valid claim of right; *secondly*, that though the intention in theft is usually to cause a permanent gain or loss, it is sufficient if the intended gain or loss is merely temporary.

NABI BAKSH

v.

QUEEN-EMPRESS.

[*Reported in I. L. R., 25 Calc., 416*].

1897. September, 15.

The judgment of the High Court **(Banerjee and Wilkins, JJ.)** was as follows :—

The appellant Nabi Baksh *alias* Ali Baksh Sheikh was tried before the Sessions Court of Murshidabad for the offence of theft committed by him while he was a servant of the complainant, and committed after two previous convictions. He was found guilty by the jury and he admitted two previous convictions ; and he has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment under sections 381 and 75 of the Indian Penal Code.

He has appealed against the conviction and sentence ; and the trial having been by the jury, the appeal lies only on a matter of law, (see section 418 of the Criminal Procedure Code) ; and this Court can alter or reverse the verdict, only if it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him [see section 423, clause (*d*)].

We are of opinion that the verdict of the jury in this case is erroneous owing to misdirection by the Judge. For the learned Sessions Judge in his charge to the jury said : "If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft. The jury will consider the accused's statement in this connection." The statement of the accused here referred to was this : "Bebi then told me to produce the things, I brought out this box, which I left concealed in the cow-shed, to give a lesson to them." And the jury returned a verdict of guilty, finding "that the taking was with the intention of putting the owner to trouble."

Now the above charge and verdict are, we think, based on a clearly erroneous view of the law. It is true that to constitute the offence of theft it is not necessary that the taking should be permanent or with an intention to appropriate the thing taken, or that there should be wrongful gain to some one in addition to wrongful loss to the real owner [see section 378 of the Indian Penal Code, illustration (*l*), *Queen-Empress* v. *Srichurn Chungo*(1)].

(1) 1895 I. L. R., 22 Calc., 1017.

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But to constitute theft there must be an intention to take the thing in question dishonestly, that is, with intent to cause wrongful gain or wrongful loss, and can it be said that removing a box "to put the owner to trouble" is necessarily and in every case causing "wrongful loss?" The answer must, we think, be in the negative. For, otherwise a person, keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest for the purpose of causing him a little anxiety, or in earnest for the purpose of teaching him the salutary lesson of being careful, would be guilty of theft, a result which the Legislature could never have intended. No doubt the language of section 23 of the Indian Penal Code which defines wrongful loss, and says a "person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property," might at first sight seem to create a difficulty in the way of accepting the view we take. But the difficulty is only apparent and not real. Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.

We, therefore, hold that the verdict in this case was erroneous owing to a misdirection by the Judge, and we reverse it accordingly and acquit the appellant.

Having regard to all the circumstances of the case, we have not thought it necessary to order a re-trial.

QUEEN-EMPRESS

v.

HARADHAN *alias* RAKHAL DAS GHOSE.

[*Reported in I. L. R., 19 Calc., 380.*]

1892.
April 20.

The judgment of the High Court **(Norris and Beverley, JJ,)** was as follows :—

This was a reference by the Chief Presidency Magistrate under the provisions of section 432 of the Code of Criminal Procedure.

The facts found by the learned Magistrate are as follows : —

The accused, a private student, was desirous of being admitted as a candidate at the Entrance Examination of the University of Calcutta to be held in Calcutta in February, 1892.

The regulations of the University require that every candidate for admission to the Entrance Examination shall send either to the Registrar of the University, or to a local officer recognised by the syndicate, an application with a certificate in the following form :

The form is marked as Ex. B which is as follows :—

[Ex. B.]

ENTRANCE EXAMINATION, FEBRUARY 1892.

[*This application must reach the office of the Registrar on or before the 28th December.*]

APPLICATION.

To

The Registrar of the Calcutta University.

SIR,

I REQUEST permission to present myself at the ensuing Entrance Examination of the Calcutta University.

The entrance fee of Rs. 10 is forwarded herewith.

I am, &c.,

HARADHAN *alias* RAKHAL DAS GHOSE.

CERTIFICATE.

The certificate of every candidate who is not a private student must be signed by the Principal or Head Master of the High School from which he appears.

The certificate of a candidate who appears as a private student, must be signed by the Principal of an Affiliated College or a Government Inspector of Schools, or by the Head Master of a High School under public management.

I CERTIFY that I know nothing against the moral character of the above-named candidate; that he has not already passed the Entrance Examination of the Calcutta University; that judging from the exercises that he has sent up, and the Test Examination to which he has submitted, there is in my opinion a reasonable probability of his now passing the Entrance Examination, and that he has signed the above application in my presence.

SARANATH CHATTERJEE,
Head Master, Pabna Government High English School.

The 23rd December 1891.

On the 3rd December 1891, the accused sent by post to the Registrar a letter, of which the following is a copy. [The same is marked as Ex. A which is as follows:

[Ex. A.]

To

The Registrar of the Calcutta University.

SIR,

I HAVE the honour to inform you that I am a private Entrance candidate. I send my fee, Rs. 10 (ten) for the ensuing Entrance Examination, 1892, by money-order, together with my application signed by the Head Master of the Pabna Government High English School. Please accept it, and send my receipt in the following address.

I remain,
Sir,
Your most obedient pupil,

HARADHAN *alias* RAKHAL DAS GHOSE.

Ganargacha (Pabna).

C/o Babu Devendra Kumar Bagchi.

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Enclosed in this letter was an application and certificate in the prescribed form.

The application was signed by the accused; and the certificate purported to be signed by "Saranath Chatterjee," who was described as "Head-Master, Pabna Government High English School."

At the time he sent the certificate the accused knew or had reason to believe, as the fact was, that the signature "Saranath Chatterjee" was not the signature of the person whose signature it purported to be.

On receipt of this letter and the enclosures the Registrar forwarded to the accused a receipt for the money-order for Rs. 10, and an "authority" to present himself at the Entrance Examination.

At the time he sent the receipt and authority, the Registrar knew that the signature "Saranath Chatterjee" was not the signature of the person whose signature it purported to be.

The accused actually presented himself at the examination and was permitted by the Registrar "to commence the examination"; but what he actually did towards "commencing the examination" the learned Magistrate does not state.

The accused was subsequently charged before the Chief Presidency Magistrate with dishonestly using as genuine a forged document, to wit, the certificate purporting to be signed by Saranath Chatterjee, the Head Master of the Pabna Government High English School (section 471, Indian Penal Code) and with attempting to cheat (sections 415 and 511, Indian Penal Code).

The learned Magistrate asks for our opinion as to whether on these facts the accused is guilty on either of the above charges, or of any other offence under the Indian Penal Code.

The learned Counsel for the prosecution did not suggest that any charge other than those mentioned could be sustained, and we so far agree with him. It remains, therefore, only to consider whether, upon the facts stated, the accused is guilty of either or both of those charges.

To support a charge under section 471, Indian Penal Code, the prosecution must prove (i) that the document in respect of which the charge is made is forged; (ii) that the accused used the document; (iii) that at the time he used it he knew, or had reason to believe, that it was forged; (iv) that at the time he used it, with such knowledge or belief, he did so fraudulently or dishonestly.

"Fraudulently" is defined by section 25, Indian Penal Code, to be "the doing of a thing with intent to defraud, but not otherwise."

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"Dishonestly" is defined by section 24, Indian Penal Code, to be "the doing of anything with the intention of causing wrongful gain to one person or wrongful loss to another person."

"Wrongful gain" is defined by section 23, Indian Penal Code, to be "the gain by unlawful means of property to which the person gaining is not legally entitled," and "wrongful loss" is defined by the same section to be "the loss by unlawful means of property to which the person losing it is legally entitled."

In construing sections 24 and 25, Indian Penal Code, we are of opinion that the primary, and not the more remote intention of the accused must be looked at.—See the observations of Edge, C. J., in *Queem-Empress* v. *Girdhari Lal*(1).

Now, what was the primary intention of the accused? Clearly this. By falsely inducing the Registrar to believe that the certificate was signed by the Head Master of a Government School under public management to be permitted to sit for the Entrance Examination.

Now, this primary intention of the accused was not, we think, fraudulent or dishonest within the meaning of sections 25 and 24, Indian Penal Code.

The learned Magistrate does not state the nature of the "authority" forwarded to the accused by the Registrar, nor does he say that the accused knew that such "authority" was necessary.

But if the "authority" consisted of some printed or written paper separate and distinct from the receipt, or of a metal token, or if it was contained in some words printed or written above or below, or on the back of the receipt, the accused's primary intention was not to obtain this authority.

If he had any intention at all about it, it was an intention to use it as a means of carrying out his main and primary intention.

The point is not devoid of authority.

In *Jan Mahomed* v. *Queen-Empress*(2) the facts were these:—

The appellants, in order to obtain from the Settlement Officer a recognition of their right to the title of "Loskur" filed before that officer a *sunnud* purporting to be a grant of that title to their father by the Rajah of Cachar. They were convicted under section 471, Indian Penal Code. On appeal the convictions were quashed. In delivering the judgment of the Court, Mitter, J., said:—"Further, on accepting all the facts as correctly found by the Sessions Judge, I do not think that the appellants are guilty of

(1) I. L. R., 8 All, 653. (2) I. L. R., 10 Calc., 584.

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any offence under the Penal Code. The facts are simply these: The appellants, in order to get a recognition from a Settlement Officer that they are entitled to the title of "Loskur," produced a *sunnud* purporting to have been granted by the Rajah of Cachar. The document is found not to be genuine. The question is, supposing the appellants used this document, knowing it to be not genuine, with intent to obtain recognition of their alleged "Loskur" title from the Settlement Officer, is it an offence under section 471 of the Indian Penal Code or under any other Penal Law of the country? The Sessions Judge found the appellants guilty under section 471 of the Indian Penal Code. In using this document if they had no fraudulent or dishonest intention, they cannot be guilty under section 471 of the Indian Penal Code.

"Section 24 of the Code defines the word 'dishonestly.' It is to the following effect:—'Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'." Now the intention of the appellants was not to cause wrongful gain or wrongful loss to any person.

"The word 'fraudulently' is thus defined in section 25 of the Code:— 'A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise.'

"In this case evidently the intention of the appellants was to produce a false belief in the mind of the Settlement Officer that they are entitled to the dignity of 'Loskur,' and in order to produce this belief they produced the *sunnud* 'A,' which has been found to be not genuine. Without defining precisely what would constitute 'an intent to defraud,' we are clear that it cannot be held in this case that the appellants produced the *sunnad* to 'defraud' the Settlement Officer, and therefore it cannot be said, that they used the document 'fraudulently,' as defined in section 25 of the Indian Penal Code. We are, therefore, unable to agree with the Sessions Judge that the appellants are guilty under section 471 of the Indian Penal Code. Nor does the act of the appellants in our opinion amount to any other offence. We, therefore, set aside the conviction and acquit the appellants."

In *Queen-Empress* v. *Munsab Ali Khan* (1) a reference from the Sessions Judge of Patna under section 307, Code of Criminal Procedure, decided by this Bench on the 22nd December last, the facts were these. The accused was desirous of entering the

(1) Cr. Ref. No. 19 of 1891 (unreported).

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Temple Medical School at Patna, which under the rules of the Institution he could not do unless he satisfied the Principal that he had a good knowledge of the English language. With a view of showing that he possessed such knowledge he presented to the Principal a certificate purporting to be signed (but which as a matter of fact he knew was not signed) by the Head Master of the Chapra Academy, which stated that he (the accused) had a good knowledge of the English language. We held that the accused could not be convicted under section 471, Indian Penal Code, as there was no dishonest or fraudulent intent.

We are, therefore, of opinion that, upon the facts stated, the accused was not guilty of an offence under section 471, Indian Penal Code, inasmuch as his use of the forged document, with the knowledge or belief that it was forged, was not fraudulent or dishonest.

The foregoing observations are equally applicable to the charge of attempting to cheat.

The essence of the offence of cheating is a fraudulent or dishonest intention; and the act done towards the commission of the offence, which is requisite to establish the attempt to cheat, must be done with a fraudulent or dishonest intent. For the reasons given above we are of opinion that the facts of the case do not disclose any such intent on the accused's part.

NOTE.

This case was over-ruled by a Full Bench in *Queen-Empress* v. *Abbas Ali*, I.L.R., 25 Calc. 512. See *post*.

QUEEN-EMPRESS

v.

SOSHI BHUSHAN.

[*Reported in I. L. R., 15 All., 210.*]

1893. April, 29.

The judgment of the Court **(Edge, C.J., and Aikman, J.)**, was delivered by—

EDGE, C. J.—Soshi Bhushan Singh, who is described as a son of Gopi Nath Singh, was convicted by the Sessions Judge of Benares of an offence under s. 471 of the Indian Penal Code, that is, of fraudulently and dishonestly using as genuine a document which he knew to be a forged document, and was for that offence sentenced to a term of six months' rigorous imprisonment. From that conviction Soshi Bhushan Singh has appealed. After hearing, Mr. Dwarka Nath Banerji for the appellant, and Mr. Arthur Strachey for the Crown, we took time to consider the wording of our judgment, as the questions of law involved in the case seemed to us to be important, but we had no doubt as to what our conclusions must be. We may say at once that we entirely agree with the findings of fact set out in the very careful and able judgment of the learned Sessions Judge.

On the 3rd of November, 1891, the prisoner presented to the Principal of Queen's College, Benares, the following application :— "To the Principal, Queen's College, Benares, Sir,—I should feel much obliged if you would kindly allow me to get admission into the second year law class of your College. As for my qualifications, I beg leave to state that I passed the F. A. Examination in 1886 from the Canning College, Lucknow, and studied in the law class there for a considerable portion of the session, during which between 60 and 70 lectures were delivered ; and I am almost sure that I was present in not less than 55 of them. So under the present rules of your College, I attended a full course of lectures to be delivered in your College, and was present in more than 75 per cent. of them. My transfer certificate is not with me for the present. It is in the office of the Metropolitan Institution, which is yet closed for the Dusserah vacation. I shall be able to produce it in a very short time. Should I be found behind the percentage required for the completion of the first year lectures, or I fail to produce the certificate in a reasonable time, two months at the most, I should raise no objection to my name being transferred to the roll of the first year class—I have, &c., Soshi Bhushan Singh. Benares, the 3rd Novembet 1891."

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No student is permitted to attend the second year law class at Queen's College unless he has attended the first year law class at the College, or produces a "transfer certificate" granted by the Principal of one of the other recognised Colleges or educational institutions, showing that at such other College or institution he had attended a first year law class. Upon that application the Principal of Queen's College, on the 4th of November, 1891, passed the following order :—

"May join the second year class on condition that if his certificate is incomplete he will be transferred to the first year."

The Professor of Law at Queen's College is paid by the fees received from students admitted to the law classes. Those fees are as follows :—A student admitted to a first year law class pays Rs. 5 as an admission fee and Rs. 45 as the tuition fee for that year. A student admitted to a second year law class pays Rs. 54 as the tuition fee for that year. A student admitted to the second year law class in Queen's College on a "transfer certificate," pays the latter fee of Rs. 54 only to the College. In November or December, 1891, and after the Principal of Queen's College had passed the order which we have set out, the prisoner presented to the Law Professor of Queen's College the document which has been found to be a forged document, and in respect of the using of which the prisoner has been convicted. That document is as follows :—

"Certified that Soshi Bhusan Singh attended the law class attached to this College from June, 1886, to February, 1887. The roll was called 72 times during this period and Soshi Bhusan was present in 63 of them. Fees paid up.—M. J. White, M. A., Principal, Canning College. The 17th March, 1887."

After perusing that document the Professor of Law returned it to the prisoner. The prisoner was permitted, on the faith of that document being a genuine "transfer certificate," to attend, and he did attend, the second year law class at Queen's College. After the completion of the attendance of the second year law class, the prisoner, on the 21st or 22nd of November, 1892, presented to the Professor of Law the following application :—

"To the Law Professor, Queeen's College, Benares.—Sir,—As I have completed the course of lectures in the law class, I most respectfully beg to request the favour of your granting me a certificate to that effect.—I have, &c., Soshi Bhushan Singh. Benares, the 22nd of November, 1892."

Although the application bears date the 22nd November, 1892, it apparently must have been presented on the 21st of November,

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1892, as on the 21st of November, the Principal of Queen's College passed on that application the following order:—

"Give him a certificate stating the period he has attended here."

On the 23rd of November, 1892, the prisoner presented to the Professor of Law the following application:—

"To the Law Professor, Queen's College, Benares.—Sir,—I most respectfully beg to state that I am going to appear in the Calcutta Judge's Court Pleadership Examination. But the authorities there do not recognise two separate certificates from two separate institutions. I therefore request the favour of your granting me a fresh certificate consolidating these two into one.—I have, &c., Soshi Bhushan Singh. Benares, 23rd of November, 1892."

Upon that application the Principal of Queen's College, on the 24th of November, 1892, passed the following order:—

"Former application must be produced."

The head clerk of Benares College asked the prisoner for his "transfer certificate," and the prisoner gave to the head clerk the document, bearing date the 17th of March, 1887, which we have already set out. A draft certificate stating that the prisoner had attended thirty-nine out of sixty-eight lectures in the law department of Queen's College from the 3rd of November, 1891, to the 23rd of November, 1892, had been prepared in the office of the College.

The papers were submitted to the Principal of Queen's College, and the prisoner attended before him. The Principal's suspicions as to the genuineness of the document which bears date the 17th of March, 1887, were aroused, and he suspended the issuing of the consolidated certificate pending inquiries. In the result the prisoner was prosecuted and was convicted of the offence under s. 471 of the Indian Penal Code.

The signature of the document which bears date the 17th of March, 1887, was not the signature of Mr. M. J. White, the Principal of Canning College, Lucknow; that document was not issued by his authority. Between June, 1886, and February, 1887, inclusive, only forty-eight lectures, and not seventy-two, were delivered in the law class of Canning College; the prisoner had not paid any fee for attendance at the law class of Canning College; his name was not on the register of Canning College as that of a student attending the law class, and in fact he had not attended any of the lectures of the law class of Canning College, Lucknow. It is obvious, on the above facts, that the prisoner must have known that the document bearing date the 17th of March, 1887, was not,

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what it purported to be, a genuine transfer certificate. It is also obvious that when the prisoner in November or December, 1891, presented to the Professor of Law of Queen's College the document which bears date the 17th of March, 1887, he did so with the two-fold object of avoiding the necessity of attending the first year law class and of paying the fees of Rs. 5 and Rs. 45, which, as a student attending the first year law class, he would, otherwise be obliged to pay, and of obtaining admission to the second year law class.

It is also obvious that when the prisoner in November, 1892, gave to the head clerk of Queen's College the document which bears date the 17th of March, 1887, he did so in order to induce the Principal of Queen's College to believe that he had attended a first year law class at Canning College, Lucknow, and thereby to obtain a consolidated certificate, which according to his application, dated the 23rd of November 1892, would be required for the purpose of his being admitted to the Pleadership Examination in Calcutta.

On the above facts the question of law is, had the prisoner committed the offence of which he has been convicted? In support of the appeal Mr. Banerji relied upon the decisions in *Queen-Empress* v. *Haradhan* (1), *Jan Mahomed* and *Jabar Mahomed* v. *Queen-Empress* (2), *Empress* v. *Dwarka Prasad* (3), and *Queen-Empress* v. *Girdhari Lal* (4).

For the Crown Mr. Strachey relied upon the decisions in *Queen-Empress* v. *Appasami* (5), *Queen Empress* v. *Ganesh Khanderao* and *Ganesh Daulat* (6) and an unreported decision of this Court in the *Queen-Empress* v. *Bhushan Chandra*, decided on the 29th of July, 1890.

In order to ascertain whether the necessary ingredients of an offence under s. 471 of the Indian Penal Code existed in this case on the facts found by us, and also by the Court below, we must read ss. 470, 464, 463, 29, 25, 24 and 23 of that Code.

The document in question, namely that bearing date the 17th of March, 1887, could only have been made with the object of being used. It would be useless, except as a certificate that the prisoner had from June 1886 to February 1887 attended the law class of Canning College, and had been present at sixty-three out of seventy-two lectures in that law class; and the only object for

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(1) I. L. R., 19 Calc., 380.
(2) I. L. R., 10 Calc., 584.
(3) I. L. R., 6 All., 97.
(4) I. L. R., 8 All., 653.
(5) I. L. R., 12 Mad., 151.
(6) I. L. R. 13 Bom., 506.

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which it could have been made was that, purporting to be a genuine certificate under the hand of the Principal of Canning College, it would enable the prisoner to avoid the necessity of attending a first year law class and of paying the fees payable for an attendance at a first year law class. It was made with the obvious intention of being presented to the Principal of some College or educational institution in which students are not allowed to attend a second year law class unless they have previously attended a first year law class. In our opinion it was not only "dishonestly" made, as that word is defined in s. 24, but it was also "fraudulently" made, as that word is defined in s. 25 of the Indian Penal Code. It was made with the intention of causing wrongful gain to the prisoner and wrongful loss to the Professor of Law, or to the College authority where it was to be used, by enabling the prisoner to keep in his own pocket fees which otherwise he would have had to pay. Such fees would, in our opinion, be "property" within the meaning of s. 23. That document was further fraudulently made as having been made with the intention that the prisoner should by the use of it deceive a College authority, and obtain admission to a second year law class. Illustration (*k*) to s. 464 of the Indian Penal Code shows that if A without B's authority writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z, A commits forgery, inasmuch as he intended to deceive Z by the forged certificate and thereby to induce Z to enter into an implied or express contract of service. We can see no difference in principle between the case of a man making a false certificate in order to obtain employment and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege, which without such deception could not have been obtained. We are consequently of opinion that the document in question was a false document within the meaning of s. 464 of the Indian Penal Code.

The next question is, did the person who made that false document commit forgery within the meaning of s. 463 of the Indian Penal Code? That section is as follows:—"Whoever makes any false document or part of a document with intent to cause damage or injury to the public, or to any person, or to support any claim or title, or to cause any person to part with property or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

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We cannot agree with Norris, J., in *Queen-Empress* v. *Haradhan*(1) that the claim in that section is limited to a claim to property. There does not appear to us to be anything in the section to so limit the application of that word. If the Legislature had intended to limit that word to a claim to property, we should have expected that the section would have run thus :—"Or to support any claim or title to, or to cause any person to part with, property."

In our opinion the claim may be a claim to anything, as, for instance, a claim to a woman as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance at a law class in a College, or to be admitted to a University or other examination, or a claim to the possession of immoveable or any other kind of property. Why should the making of a false document to support a claim to an old coat, not worth Rs. 5, be a forgery, and the making of a false document to support a claim to the custody of a child not be a forgery? The document dated the 17th of March, 1887, was made with some object. The person who made it must have intended that it should be used for some purpose which could not have been honest. He must have made it with the intention that it should be used to deceive some one into the belief that the prisoner had attended a year's course of law lectures at Canning College. It is only reasonable to believe that the document was made with the intention of supporting a claim by the prisoner to be admitted as a student to a second year law class.

It is possible that it was made with the intention of being used to obtain ultimately for the prisoner a consolidated certificate. In any case it must have been made with the intention that by using it the prisoner might obtain admission to a second year law class. That document was in our opinion made with the intent to support a claim within the meaning of s. 463 of the Indian Penal Code.

There cannot in our opinion be any doubt that a written certificate is "property" within the meaning of s. 463. If the prisoner had obtained the certificate which he tried to obtain, and some one had stolen it from him; no one, we imagine, would suggest that the theft could not legally be convicted, under s. 379 of the Indian Penal Code, of the theft of the certificate, but if the certificate was not moveable "property," the person who dishonestly took the certificate out of the possession of the prisoner, without the prisoner's consent, could not be convicted of a theft in respect of it. It is not in our opinion necessary to constitute a forgery under s. 463 that the

(1) I. L. R., 19 Calc., 380.

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"property" with which it is intended that the false document shall cause a person to part, should be in existence at the time when the false document was made. For example, if A gave an order to B to buy the material for making and to make a silver tea service for him, and C, before the tea service was made or the materials for making it had been bought, were to make a false letter purporting, but falsely, to be signed by A, authorising B to deliver to D the tea service when made, C would have committed forgery within the meaning of s. 463 by making that false document with intent to cause B to part with property, namely, the tea service, when made. We are further of opinion that the document in question was made with intent that fraud might be committed.

We entirely agree with the view of the law expressed by Sir Arthur Collins, C. J., and Parker, J., in *Queen-Empress* v. *Appasami* (1). We also entirely agree with the view of the law expressed by Jardine and Candy, JJ., in *Queen-Empress* v. *Ganesh Khanderao* and *Ganesh Daulat* (2), at pp. 512, 513 and 514 of the report.

Finally we are satisfied that the prisoner committed an offence under s. 471 of the Indian Penal Code, when in November or December, 1891, he used the document which bears date the 17th of March, 1887, by handing that document to the Professor of Law of Queen's College, as a genuine certificate signed by the Principal of Canning College, and that he again committed an offence under s. 471 of the Code when, in November, 1892, he handed that document to the head clerk of Queen's College for the purpose of obtaining the grant to him of a consolidated certificate. We dismiss this appeal.

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(1) I. L. R., 12 Mad., 151. (2) I. L. R., 13 Bom., 506.

QUEEN-EMPRESS

v.

ABBAS ALI.

[*Reported in I. L. R., 25 Calc, 512.*]

This case was referred to a Full Bench by Jenkins J., sitting in the exercise of Original Criminal Jurisdiction.

1897.
January 29.

The opinion of the Full Bench was delivered by

Maclean, C. J. (O'Kinealy, Macpherson, Trevelyan and Jenkins, JJ., concurring).—The accused in this case was tried before Mr. Justice Jenkins and a common jury on a charge of having fraudulently or dishonestly used as genuine a certain forged document, to wit, a document purporting to be a certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch *Nicol*, and being a forged document, knowing or having reason to believe the same to be a forged document, and that thereby he committed an offence punishable under sections 465 and 471 of the Indian Penal Code.

The certificate in question purported to be a testimonial of service and good character.

It seems that in accordance with the provisions of Act VII of 1884 and the Regulations issued under that Act, examinations are from time to time held in Calcutta of those who desire to obtain certificates of competency as engine-drivers of ocean-going steamers. As a condition precedent to his qualification for any such examination each candidate has to produce to an appointed officer a certificate or testimonial of his having served as principal or first Serang or Tindal in the engine-room of a steamer for the prescribed period, and this certificate has to be signed by a certificated engineer under whom he has served.

On the production of the required certificate or testimonial a form of application is filled up, and then signed by the candidate in the presence of the Port Officer; thereupon the candidate is entitled to present himself for examination.

On the 14th of August, 1886, the accused produced the certificate mentioned in the charge to Dinonath Mukerji, the officer deputed to receive and examine candidate's certificates.

It is established by the evidence that this was done by the accused for the purpose of having the requisite application for examination filled up and of qualifying himself as a candidate for

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the examination of engine-drivers under Act VII of 1884, and further that the accused used the certificate as genuine, though he knew that it was a document made with the intention of causing it to be believed that it was made by a person by whom it was not made, and with the further intention that it should be used in the manner in which it was in fact used by the accused.

It also appears that the use to which the certificate was put by the accused was an essential and necessary condition of the success of his scheme.

A verdict of guilty, was returned in accordance with the ruling of the Judge, who, however, reserved and referred for our decision the question whether, having regard to the decision in *Queen-Empress* v. *Haradhan*(1) his ruling and the conviction could be upheld.

The *Queen-Empress* v. *Haradhan*(1) has been dissented from in *Queen-Empress* v. *Shoshi Bhushan*(2) and the point reserved has no doubt been the subject of conflicting decisions.

It will, however, serve no useful purpose to enter into a minute examination of the several authorities to which we have been referred: the law is contained in the Code, and whether the conviction now under consideration is sanctioned by its provisions is best to be determined by an examination of the Code itself.

Now section 471 of the Indian Penal Code is in the following terms: "Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document."

It will be seen that the essential elements of the offence are (1) that the document in question should be a forged document, (2) that the accused should have used it as genuine, and (3) that he should have so used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

A forged document is a false document made wholly or in part by forgery (section 470), and we learn the meaning of a false document from section 464 which (omitting the portions immaterial to the present purpose) provides, that a person is said to make a false document who dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made by a person by whom he knows it was not made. Forgery is in term defined by section 463, which is

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(1) (1892) I.L.R., 19 Calc., 380.

(2) (1893) I.L.R., 15 All., 210.

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in the following terms : "Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

This referential definition of a forged document is to a certain extent tautologous, but be that as it may, it is clear that the person against whom the offence is charged must have acted dishonestly or fraudulently, and the sole question in the present case is whether that can be predicated of the accused, Abbas Ali.

"Dishonestly" is defined by section 24, which provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly : and the meaning of the expressions wrongful gain and wrongful loss is made clear by section 23. "Fraudulently" is defined by section 25 in the following words :—

"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist ; for it leaves it to be determined, and that really is the point on which the present case turns, whether the word "defraud" as used in section 25 implies the deprivation or intended deprivation of property as a part or result of the fraud. The word defraud is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not, so far as we are aware, to be found in the Code except in section 25, its meaning must be sought by a consideration of the context in which the word fraudulently is found.

The word "fraudulently" is used in sections 471 and 464 together with the word "dishonestly" and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word hishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word "fraudulently" should not be confined to transactions of which deprivation of property forms a part.

There appears to us, however, to be a still more potent reason based on the language of section 463 for arriving at this conclusion.

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Section 463 defines the offence of forgery, and in so doing prescribes the intents necessary to that offence. The words of the section are as follows: "Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery."

The section contemplates two classes of intents, and it is clear (especially if regard be had to the context) that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document, which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed by section 463.

It appears to us, therefore, that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into section 464, and by a similar train of reasoning we are led to the like conclusion as to the true construction of section 471.

Though we are in no way bound by the decisions of the English Courts, still we are fortified in the view we take of the expression "intent to defraud" by the decision in *Reg.* v. *Toshack*(1). We therefore hold, so far as the question reserved and referred for our decision is concerned, that the accused Abbas Ali was rightly convicted of the offence with which he was charged.

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(1) (1849) 4 Cox. C. C., 38; 1 Den. Cr. C., 492.

NOTE.

The view taken in this case, is in harmony with that adopted in the other Indian High Courts. See *Queen-Empress* v. *Khandu Singh*, I. L. R., 22 Bom., 768; *Kotam Raju* v. *Emperor*, I.L.R., 28 Mad., 90 [a decision of a Full Bench which will repay careful study as both views are discussed in the judgments, Sir Arnold White C.J., Benson and Boddam JJ. adopting the later Calcutta view and Subrahmania Ayyar and Davies, JJ., supporting the earlier Calcutta view]; *Queen-Empress* v. *Sothi Bhusan*, I.L.R., 15 All. 210, see *ante* and *Emperor* v. *Ali Hasan*, I.L.R., 28 All. 358.

THE EMPRESS

v.

RIASAT ALI.

[*Reported in I. L. R., 7 Calc., 352.*]

1881.
June, 3.

The judgments of the Court **(Garth, C. J., and Prinsep, J.)** were as follows :—

GARTH, C. J.—The prisoner in this case was charged with an attempt to commit forgery, and the facts proved were, that he gave orders to the Burdwan Press to print one hundred receipt forms similar to those which were formerly used by the Bengal Coal Company ; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that now used by the Company, when he was arrested by the police. The jury found him guilty of an attempt to commit forgery, "in that he dishonestly and with the intent to commit fraud caused a document to be printed with the intention of making such an addition to it as would make it a false document."

Assuming this finding of the jury, as to what the prisoner actually did, to be correct, the question is, whether he could be legally convicted of an attempt to commit forgery? The definition of forgery in ss. 463 and 464 of the Indian Penal Code, so far as it is necessary to refer to it for our present purpose, is as follows :— Section 463 says, "Whoever makes a false document, or part of a document, with intent to commit fraud, commits forgery." And by s. 464 a person is said to "make a false document who dishonestly makes or executes a document, or part of a document, with the intention of causing it to be believed that such document, or part of a document, was made, sealed, or signed by, or by the authority of a person, by whom or by whose authority, he knows that it was not made, sealed, or signed."

Now in this case the jury have not found that the receipt form in itself was a false document. If they had, they must have found the prisoner guilty of forgery, and not of the attempt to commit it. They considered, and rightly considered, as it seems to me, that without the addition of a seal or signature purporting to be the seal or signature of the Bengal Coal Company, the printed form would not be a false document. Their view, as I understand it, was, that the commencing to print or write a document, which, when completed, was intended to be a false document, amounted, if coupled with the intent to defraud, to an attempt to commit forgery.

But it has been suggested, that the printing and correcting of a

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form which is intended by additions, which are to be made to it, to be a false document, is in itself the making of a part of a false document within the meaning of s. 464, and therefore amounts to forgery. If this were so, it seems to me that the mere printing or writing of a single word upon a piece of paper, however innocent the word might be, would be the making a part of a false document, if it were coupled with an intention to add such other words to it as would make it eventually a false document. In my opinion this is very far from the meaning of s. 464; and I think that such a construction of the section involves a misconception, not only of the word "make," but also of the sense in which the phrase "part of a document" is used in the section.

I consider that the "making" of a document, or part of a document, does not mean "writing" or "printing" it, but signing or otherwise executing it; as in legal phrase we speak of "making an indenture" or "making a promissory note," by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word "makes" is used in the section in conjunction with the words "signs" "seals," or "executes," or makes any mark "denoting the execution, &c.," seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it.

Referring then again to the finding of the jury, the question in this case seems to be, whether what the prisoner did, amounted to preparation only, or to an actual attempt to commit the offence.

In the case of *Reg.* v. *Cheeseman* (1), Lord Blackburn thus defines an attempt to commit a crime. He says:—"There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime": and in *M'Pherson's case* (2), Cockburn, C. J., says:—"The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to

(1) Lee & Cave's Rep., 145. (2) Dears & B., 202.

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do that which, if successful, would amount to the felony charged." It seems to me, that this definition of an attempt to commit an offence is a sound one, and applying it to the present case, the question is whether what the prisoner did, amounted to an attempt to make a false document.

I have already said that, in my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s. 464), until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company. The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the words of Lord Blackburn) "the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted." But as it was, all that he did consisted in mere preparation for the commission of the crime. He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence.

I think, therefore, that the conviction should be set aside, and the prisoner discharged. He may think himself extremely fortunate that his premature arrest prevented him from completing what he evidently intended.

PRINSEP, J.—I concur in setting aside the verdict of the jury and the sentence passed on the appellant, because, in my opinion the acts, found by the jury to have been committed, do not amount to an attempt, but at most only to a preparation to commit a forgery which might have proceeded no further. I agree in the opinion expressed by the Chief Justice regarding the legal definition of an attempt to commit an offence,—*viz.*, that there must be something "commenced which would have ended in the crime if not interrupted." The prisoner must, therefore, be acquitted and released.

Conviction set aside.

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NOTE.

See the definition of an attempt to commit a crime given in Stephen's Digest of Criminal Law, Art. 50, where it is described as an act done with intent to commit a crime and forming part of a series of acts which would constitute its actual commission, if not interrupted ; see also *R.* v. *Linneker*, (1906) 2 K. B. 99.

The view taken in this case as regards an "attempt" to commit an offence is dissented from by the Allahabad High Court in the case of *Re-petition of MacCrea*, I.L.R., 15 All. 173. See *post*.

IN THE MATTER OF THE PETITION OF R. MacCREA.*

[*Reported in I. L. R., 15 All., 173.*]

1893.
February, 24.

The following judgments were delivered by :

Knox, J.—This is an application under s. 32 of the Letters Patent of 1866, praying that the case of one Robert MacCrea, who was convicted and sentenced at a Criminal Sessions of this Court held in the month of June, 1892, might be declared a fit case for appeal to Her Majesty in Council on the grounds—

1st.—That the evidence that the said Robert MacCrea acted with guilty knowledge and intention, was most unsatisfactory and totally inadequate to justify the conviction.

2nd.—That one of the witnesses for the prosecution had stated that, so far as he was aware, no application had been made by the said MacCrea for payment of interest or renewal of any Government promissory note, and that the acts of the said MacCrea had simply amounted to an asking for information and to the despatch of a money-order with a view to obtain that information.

3rd.—That these acts of the said MacCrea, even if they had been accompanied with guilty knowledge, do not amount to more than a preparation for an attempt to cheat, and that such an attempt is not an offence under the Indian Penal Code.

4th.—That no other acts attributed to the appellant could be held to constitute the offence of attempting to cheat under the Indian Penal Code.

5th.—That with the substantive charge, the charge of abetment must fail.

6th.—That, even if the conviction on the charge of abetment be good, the sentence passed was illegal.

The charges upon which the petitioner was convicted were three in number. They consisted of :—

(1) An attempt to cheat, and thereby fraudulently to induce the delivery of a valuable security.

(2) Conspiracy with one Asad Ali, and thereby abetment of the offence of cheating and thereby inducing the delivery of a valuable security.

(3) Abetment of an attempt to cheat, committed by the aforesaid Asad Ali.

Upon conviction of the three offences thus charged, MacCrea was sentenced to rigorous imprisonment for two years.

No argument was addressed to us upon the fifth and sixth

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grounds taken in this petition. The first ground is directed to matters of fact which were distinctly within and were left to the decision of the jury. There was evidence upon which such a finding could be based. That evidence was found by a majority of the jurors to be satisfactory and sufficient for a conviction.

The only question really pressed upon our consideration was whether the jury had been rightly directed when told that if they were satisfied that the acts covered by the evidence and said to have been committed by the said MacCrea were so committed, those acts performed with guilty intent did amount to an attempt at cheating under the Indian Penal Code.

It is important first to set out that portion of the charge which related to the first charge on the charge-sheet, *viz.*, the attempt to commit an offence under s. 420 of the Indian Penal Code. A careful note of this portion of the charge was made before it was delivered to the jury, and the jury were directly charged from the note thus recorded. The instruction to them was that before they could find the prisoner MacCrea guilty of an attempt at cheating as charged, they must satisfy themselves that there was proof of an intention on his part to cheat and thereby induce the delivery to himself or to Asad Ali of a Government promissory note which he knew to be the property not of the late brother of Asad Ali but of one Muhammad Husain Ali Khan.

That, coupled with proof of such intention to cheat on his part, there was proof of an act or acts done by the said MacCrea towards such cheating.

That those acts, if proved, were sufficiently important to be taken notice of by the law, and also that they were sufficiently near to the act of cheating intended and contemplated.

The various acts deposed to on the part of the witnesses for the Crown were then detailed, and the evidence bearing on them pointed out and commented on, and it was left to the jury to find and to pronounce whether the evidence proved that those acts had been committed by the prisoner, and whether they were evidence of an intention on his part to cheat and thereby induce delivery of a valuable security.

As to whether the acts, or any of them, were sufficiently great for the law to take note of, the jury were instructed that, if they were satisfied that MacCrea had, as alleged by the Crown, towards the offence of cheating, used the letters of administration granted by the Subordinate Judge of Lucknow, knowing them to be false in the material point that they set out Government promissory note

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No. 9764 to have been the property of Husain Ali Khan, Chabuk Sawar, this was an act sufficiently great for the law to take note of, and an act which it would take note of.

As regards proximity, the jury were instructed to consider whether any of the acts were sufficient to excite reasonable apprehension that the act attempted would be carried out and accomplished with the intent to cheat.

It is contended by Mr. Reid who appears for the petitioner, that no act committed by MacCrea amounted to more at the outside than a preparation for an attempt to commit the crime, and that no act was punishable under the Indian Penal Code as an attempt, unless it was an act which, if successful, would have resulted in the commission of the crime attempted.

In the argument which he addressed to us, the learned Counsel drew our attention mainly and almost entirely to the various letters which were addressed by MacCrea to the Comptroller-General's office, and passed by without comment the various other acts committed by MacCrea in the interval between the 17th day of June and the 18th day of October, 1891. His contention was two-fold ; *first*, that none of the communications addressed to the Comptroller-General, did, as a matter of fact, deceive that officer, or any of the officers through whose hands they passed, and, *second*, that beyond those acts there would necessarily have followed several other acts, some of them to be done by himself or by Asad Ali, extending over a period of time which might have amounted to two years, before the Comptroller-General would have paid over either the principal or the interest due upon the Government note No. 9764.

But the notes of my charges to the jury show that their attention was directed to various other acts which the Crown sought to establish, and notably to the acts committed by the prisoner in making use of the letters of administration granted to Asad Ali Khan and in the preparation of a so-called copy of the lost note and its production before the city Magistrate in October, 1891.

In support of his contention, the learned Counsel referred us to the case of *The Queen* v. *Ramsarun Chowbey* (1). That was a case in which upon the findings that a prisoner intending to procure a forged document had directed a servant to purchase blank stamped paper on which the document might be executed, and to describe himself to the stamp-vendor as the person who,

(1) N.-W. P., H. C. R., 1872, p. 46.

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the prisoner wished it to be deemed, was the executant of that document, and that the stamp-vendor had endorsed upon the bond an endorsement stating that he had sold the stamp paper to the person personated by the servant, the said prisoner was convicted of an attempt to forge a valuable security. Sir Charles Turner in that case held that the provisions of s. 511 of the Code would not extend to make punishable, as attempts, acts done in the mere stage of preparation, "although," he continued, "such acts are doubtless done towards the commission of the offence, they are not done *in the attempt* to commit the offence, in the construction which, I think, should be put on the term 'attempt' as used in this section. I regard that term, as here employed, as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done or omitted which of itself is a necessary constituent of the offence committed."

In considering this case, it is to be noted, first, that the learned Judge who arrived at this decision confesses that he arrived at that conclusion not without some doubt, and that he considered the endorsement no part of the document intended to be forged, and that the act of the prisoner in procuring the endorsement would not immediately lead to the forgery. He further observed that the prisoner had had a most narrow escape. The grounds upon which he acquitted the prisoner were, because he considered that no act proved against him went beyond the stage of preparation.

We were next referred to the case of *The Empress* v. *Riasat Ali*(1). In that case the learned Chief Justice appears to have acted upon English precedents, and those precedents, precedents of no modern date. So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word "attempt" as understood by English lawyers in the phrase "attempt to commit a felony," and the word "attempt" as actually defined in the Indian Penal Code.

If there be such a difference, I have no hesitation in affirming that we are bound to follow the Code. In *Reg.* v. *Cheeseman*(2), one of the cases followed by Sir R. Garth, it is laid down that if the actual transaction had commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime. In *McPherson's Case*(3), the second case followed, it

(1) I. L. R., 7 Calc., 352.

(2) Lee & Cave's Rep., 145. (3) Dears & B, 202.

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is said that "the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." Now it is impossible to read these definitions of attempt and to fail to see that the language used differs very greatly from the language used in s. 511 of the Indian Penal Code. Sir Charles Turner in the case just cited [*The Queen* v. *Ramsarun Chowbey*(1)] points out that in his opinion the language and the illustrations used in s. 511 were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law. With all respect therefore to the learned Judges who decided the case of *The Empress* v. *Riasat Ali*(2), I have no doubt myself that the interpretation laid down by them is not a sound and exhaustive interpretation of the word "attempt" as used in s. 511.

The case of *The Queen-Empress* v. *Dhundi*(3), which was next cited to us, is not a case in point. The Judge who referred that case and whose reasons were adopted by this Court, points out that the person upon whom the fraud had to be perpetrated had not been approached in any way by the prisoner Dhundi.

The words used in s. 511 by which whoever attempts to commit an offence punishable by the Code and in such attempt does any act towards the commission of the offence, is guilty of an attempt, appear to me to be quite wide enough to cover the acts committed by MacCrea. There was a stage in which he was undoubtedly only making preparations, and had not got beyond the stage of preparation. These were such acts as those when he first commenced making inquiries from the Public Debt Office to find if the note No. 9764 was still outstanding; when he instituted inquiries at the Bahrampur Hospital as to the death of Husain Ali Khan and the disposal of his bedding. These were acts in the preparation stage. But a majority of the jury have found, and I agree with them, that MacCrea committed a long series of acts subsequent to that which showed a distinct intention to cheat; acts committed for the purpose and with the intent to bring all his preparations to bear upon the mind of the person to be deceived; that with those acts, beginning with the procuring of letters of administration setting out Asad Ali Khan as the lawful owner of Government promissory note No. 9764, the forwarding of those false letters of administration

(1) N.-W. P., H. C. R., 1872, p. 46. (2) I. L. R., 7 Calc., 352.
(3) I. L. R., 8 All. 304.

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and draft notice for publication in the Gazette, had begun an attempt to cheat; that in that attempt he had committed more than one act of distinct crime and sufficiently near towards completion to arouse apprehension and alarm that the attempt, if not interrupted, would end in the commission of the offence. I do not hold, and have no hesitation in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.

Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable secutity commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, and act after

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attempt begun, and towards commission of the offence attempted and an act independent of the attempt altogether. It cannot be said that there was not evidence in this case upon which the jury could find under which of these heads the acts committed by MacCrea properly fell.

I gave the case most careful consideration before I charged the jury. I have listened with minute care and attention to the very able and lengthened argument of the learned Counsel who appeared for MacCrea and have given that argument most careful consideration; but I do not find in it all one word which makes me hesitate or doubt that the conviction was a proper and sound one. I do not think the case a fit case for appeal and reject the application.

Blair, J.—I wish to add a few words upon the sections of the Indian Penal Code applicable to this case.

The offence, an attempt to commit which was the subject of the charge before us, is created by s. 415 of the Indian Penal Code. The words run as follows :—

"Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property or to do certain other acts." Converting that section into a section dealing with attempts it would read :—"Whoever by deceiving or attempting to deceive any person fraudulently or dishonestly, attempts to induce, &c."

That which is done in furtherance of the dishonest attempt, is to attempt to deceive, the act being one which must have a tendency to induce the person so deceived to do that which is dishonestly desired by the deceiver.

The definition of "attempt" is conveyed in s. 511, Indian Penal Code. The words are "whoever attempts to commit an offence punishable by this Code"—"or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, &c."

It seems to me that that section uses the word "attempt" in a very large sense ; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, condusive to its commission, is itself punishable, and, though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, &c., shall be punishable.

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The term "any act" excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases cited by Mr. Reid. An illustration is fortunately appended to the section by which we are enabled to test the soundness of that interpretation.

Illustration (*a*).

"A makes an attempt to steal jewellery by breaking open a box and finds after opening the box that there is no jewellery in it. He has done an act towards the commission of theft and is therefore guilty under this section."

That is an illustration applicable to theft, and yet, upon the very face of the statement it would not be an attempt having regard to the definition of theft in the Indian Penal Code, within the meaning of the contention of Mr. Reid. The essence of theft is *asportatio*, *i.e.*, removal. The opening of a box which might or might not contain valuables is not an attempt to remove its contents; it would require some act further than that to constitute an attempt within the meaning of the English cases cited by Mr. Reid.

Now in the present case the acts done were acts bearing, and intended to bear, upon the mind of another person. The acts having been done, that mind was left to operate. If therefore that which was done amounted to the commission of an act towards deceiving, in a case where such deception would operate as an inducement to the person deceived to deliver any chattels or to do or omit any of the things mentioned in s. 415, then I think, within the meaning of s. 511 read together with illustration (*a*), an attempt to deceive and thereby induce within the meaning of that section has been proved in this case.

It may be that further acts having a tendency to deceive might have been required to complete the influence intended upon the mind of the deceived. It may have been that preliminary inquiries and steps of other kinds must have intervened between the act of deception and its entire success; but that would not, in my opinion, render an act tending directly towards deception the less an attempt within the meaning of s. 511, even though a further act of deception did not follow, which might probably have been required to complete the offence of attempt within the meaning of the English law.

The difficulty with s. 511 might easily have been removed by saying that where in such an attempt, using the word in the larger sense, any person does any act towards the commission of an offence

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he shall be held to have committed an "attempt" within the meaning of this section. That I take to be the real meaning and drift of the section, differentiating in a marked manner the definition of "attempt" in the Indian Penal Code and the accepted English doctrine.

I agree that this is not a fit case to be sent to the Privy Council.

Application rejected.